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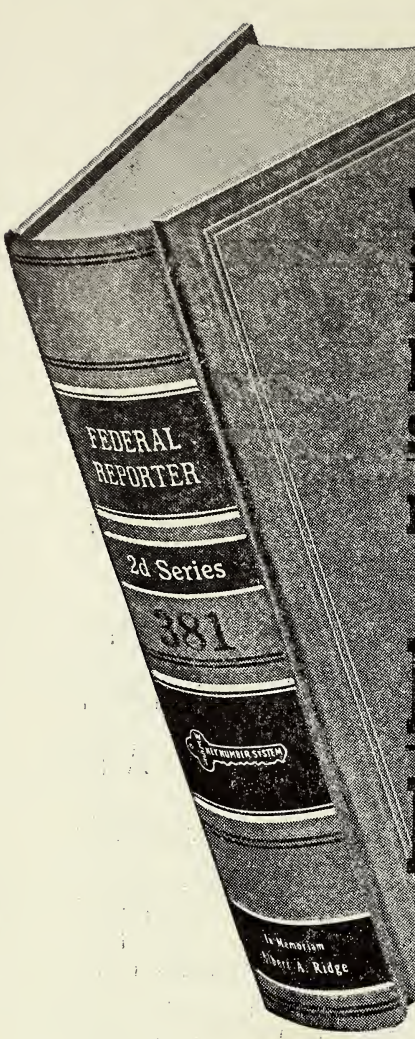

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Mississippi Law Journal

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AFTER SNYDER V. HARRIS: WHITHER GOES THE SPURIOUS CLASS ACTION?

Frank L. Maraist and T. Page Sharp***

The United States Supreme Court's somewhat surprising[1] decision in the recent case of *Snyder v. Harris*[2] has dealt a crippling blow to hopes for widespread use of the "spurious"[3] type of class action in federal courts and has forced procedural scholars to take another look at the future of this fascinating procedural device.

Snyder was the first major case interpreting the federal class action provision—Rule 23 of the Federal Rules of Civil Procedure[4]—after a 1966 revision of the rule designed to abolish the earlier types of class actions—the "true," "hybrid" and "spurious" actions[5]—and to expand the use of class actions in situations formerly covered by the spurious device.[6] The Court in *Snyder* effected at least a partial resurrection of the spurious class action by holding that claims in class actions which would have been labeled spurious prior to 1966 may not be aggre-

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[1] *See, e.g.*, 2 W. BARRON & A. HOLTZOFF § 569, at 119-20 (Wright ed. Supp. 1968).

[2] 394 U.S. 332 (1969).

[3] The class action provided by original Rule 23 (a) (3) of the Federal Rules of Civil Procedure became known popularly as the "spurious" action. It was defined as an action to enforce "several," as contrasted to "joint and common," rights, where there existed among members of the class a common question of law or fact, and common relief was sought. In the 1966 amendment to Rule 23, the rule-makers sought to abolish the spurious class action and to diffuse its functions among other kinds of class actions, particularly the actions provided by Rules 23 (b) (2) and 23 (b) (3). The concept of the spurious class action was revived, however, by the Supreme Court in Snyder v. Harris. *See* text accompanying notes 15, 16 *infra*.

[4] FED. R. CIV. P. 23.

[5] *See* C. WRIGHT, LAW OF FEDERAL COURTS § 72, at 311 (2d ed. 1970).

[6] *See* Notes of Advisory Committee on Rules, 39 F.R.D. 69, 98 (1966). *See also* Joiner, The New Civil Rules, 40 F.R.D. 359, 366 (1966).

gated to reach the jurisdictional amount required in diversity cases. While the Court's decision, a disappointing one to some,[7] apparently thwarts the efforts to expand the use of the class action device, a long second look at *Snyder* reveals that the Court's choice was a sagacious one which should lead to the fullest and most advantageous use of the class action in modern American law. A brief review of the genealogy of the federal class action sets the stage for a second look at the *Snyder* decision and at the future of the spurious class action.

The class action initially was developed by courts of equity as a method of avoiding the injustices that sometimes resulted from rigid application of rules of mandatory joinder of parties to situations in which a great number of persons were necessary parties.[8] The equity courts, however, expanded the device to encompass not only those situations in which joinder of numerous parties was mandatory, but also those situations in which such joinder was not mandatory but was desirable as a means of producing judicial efficiency.[9] When the class action device was incorporated into the Federal Rules in 1937, both concepts were made available to federal courts in actions at law; the true class action and, perhaps, the hybrid class action (if it did in fact exist)[10] encompassed those situations in which joinder of absent members of the class was necessary to grant complete relief to the parties, and the spurious action was introduced to foster judicial efficiency by permitting unnecessary but desirable joinder of absent members with similar but separate and distinct claims.[11]

The spurious class action established by the original Rule 23 failed in its purpose. Federal courts, mindful of a possible conflict with the

---

[7] *See, e.g.*, C. WRIGHT, *supra* note 5, at 316.

[8] The class action developed in England as an exception to the English rule of compulsory joinder. English chancery courts developed the procedure to permit the maintenance of suits in which all of the parties were required to be present but the identity of some of the parties was unknown or the number of such parties was so large as to present practical problems in the maintenance of the suit. For a discussion of the development of the class action, see 3B J. MOORE, FEDERAL PRACTICE § 23.02(1) (1969).

Story described the evolution of the class suit in his *Commentaries* and declared that the reason for the existence of the device was to do justice. J. STORY, COMMENTARIES ON EQUITY PLEADING 127-42 (5th ed. 1852).

[9] *See, e.g.*, Sheffield Waterworks Co. v. Yeomans, 7 L.R. 2 Ch. App. 8 (1866). *See also* Kalven and Rosenfield, *The Contemporary Function of the Class Action*, 8 U. CHI. L. REV. 684, 703 (1941). *See also* Z. CHAFFEE, SOME PROBLEMS OF EQUITY 200-13 (1950).

[10] *See* C. WRIGHT, LAW OF FEDERAL COURTS § 72, at 270 (1st ed. 1963). Professor Wright states that the difference between hybrid and spurious class actions was frequently elusive.

[11] *See* original FED. R. CIV. P. 23(a)(3).

requirements of due process, refused to extend the res judicata effect of judgment in a spurious class action to absent members of the class, i.e., those members who were not named parties or who did not receive actual notice and an opportunity to be heard in the proceedings.[12] Thus the spurious class action became either, as many courts characterized it, merely a device for permissive joinder,[13] or, as other courts characterized it, an invitation to the absent members of the class to intervene.[14] In either event it failed to produce the judicial efficiency that was sought.[15]

In the 1966 revision of Rule 23 the federal rulemakers moved to re-establish the effectiveness of the spurious type of class action by providing that judgments in the 1966 equivalents of the spurious action, called, under the new rule, the *b(2)* and *b(3)* actions,[16] would be

[12] Kainz v. Anheuser-Bush, Inc., 194 F.2d 737 (7th Cir. 1952); Portland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945); Atwood v. National Bank of Lima, 115 F.2d 861 (6th Cir. 1940).

[13] *See, e.g.*, Lipsett v. United States, 359 F.2d 956 (2d Cir. 1966); Smith v. Abbate, 201 F. Supp. 105 (S.D.N.Y. 1961); Zachman v. Erwin, 186 F. Supp. 681 (S.D. Tex. 1959); Canuel v. Oskoian, 184 F. Supp. 70, (D.R.I. 1959), *aff'd*, 269 F.2d 311 (1st Cir. 1959).

[14] Lipsett v. United States, 359 F.2d 956 (2d Cir. 1966).

[15] While the drafters of original Rule 23 were silent on the purpose of the spurious class action, there can be no doubt that the revisers of the Rule in 1966 designed the *b(3)* action, which embraced most of what formerly had been the spurious class action, as a method of achieving judicial efficiency. The advisory committee wrote:

> Subdivision (b) (3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in [b (1) and b (2) class actions], but it may nevertheless be convenient and desirable depending upon the particular facts. *Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort and expense,* and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. (citation omitted).
>
> The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. *It is only where this predominance exists that economies can be achieved by means of the class action device.* (emphasis added). Notes of Advisory Committee on Rules, 39 F.R.D. 69, 220 (1966).

[16] The amended Rule 23 (b) provides for four "types" of class actions, labeled and described as follows:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds

binding upon absent members of the class, even though such absent members did not receive actual notice of the proceeding.[17] Although some courts recognized the possible constitutional infirmity in such a provision[18] and refused to maintain either the *b(2)* action[19] or the *b(3)* action[20] without notice to the absent members, other courts accepted the mandate of the new rule,[21] and the new spurious class action was gaining widespread use by 1969 when the *Snyder* decision was handed down.

In *Snyder*, the Supreme Court granted certiorari to consider decisions of the Fifth and Eighth Circuits that conflicted with a decision of the Tenth Circuit on whether it was permissible to aggregate claims of members of a *b(3)* type of class to reach the $10,000 jurisdictional amount required for diversity jurisdiction. The Eighth Circuit had held[22] that a stockholder, filing a class action for herself and other stockholders under amended Rule 23, could not aggregate the claims of absent stockholders of the class she represented. Since her claim, standing alone, was less than $10,000, the suit was ordered dismissed for lack of jurisdiction. The Eighth Circuit in reaching its conclusion had followed the position taken by the Fifth Circuit in a somewhat similar decision.[23]

In the Tenth Circuit case,[24] a customer of a public utility filed a

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generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . . 39 F.R.D. 69, 220 (1966).

While each of the revised types of class actions possesses some attributes of each of the earlier true, spurious and hybrid class actions, it is apparent that the new *b(1)(A)* and *b(1)(B)* actions primarily are designed to fulfill the functions formerly served by the true and hybrid actions, and that the *b(3)* and, to some extent, the *b(2)* actions, are replacements for the old spurious action.

[17] FED. R. CIV. P. 23(c)(3). *See also* Advisory Committee Note, 39 F.R.D. 98, 193 (1966).

[18] *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir., 1968); Clark v. American Marine Corp., 297 F. Supp. 1305 (E.D. La. 1969); Cranston v. Freeman, 290 F. Supp. 785 (N.D.N.Y. 1968).

[19] *See, e.g.*, Clark v. American Marine Corp., 13 FED. RULES SERV. 2d 23b.2, Case 1 (E.D. La. 1969).

[20] Bragalini v. Biblowitz, 13 FED. RULES SERV. 2d 23b.3, Case 8 (S.D.N.Y. 1969).

[21] *See, e.g.*, Breland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968).

[22] Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968).

[23] Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967).

[24] Gas Service Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968).

class action for himself and other customers similarly situated to recover alleged illegal overcharges from the utility. The claim of the named plaintiff amounted to only $7.81, but aggregation of his claim with the claims of approximately 18,000 absent members of the class he sought to represent would have resulted in a claim in excess of the $10,000 jurisdictional amount required for diversity jurisdiction. The Tenth Circuit held that the 1966 amendment to the rule, abolishing the old labels of true, hybrid and spurious class actions, had the effect of permitting aggregation of claims to reach the jurisdictional amount in what had been (prior to 1966) the spurious class action.

The Supreme Court upheld the Eighth Circuit and reversed the Tenth Circuit, ruling that although joint or common claims—those falling under the old true and hybrid class actions of the original rule and now classified primarily as *b(1)* actions—could be aggregated for the purpose of reaching a required jurisdictional amount, claims that are separate and distinct—the old spurious type now embraced primarily by the *b(2)* and *b(3)* categories—could not. To allow otherwise, the Court found, would be to permit a federal rule, Rule 23, to expand the jurisdiction of federal courts when such expansion was prohibited by the rules and by the Congressional act authorizing the adoption of the rules.[25]

Nowhere in its decision did the seven-man majority of the Supreme Court allude to the effect that the decision might have upon the future of the spurious type of class action in federal courts, but the effect is apparent to any student of federal jurisdiction and procedure. Jurisdiction of federal courts stems generally from two sources—diversity of citizenship[26] and federal question cases.[27] Diversity jurisdiction requires that the minimum amount of $10,000 be in controversy,[28] while jurisdiction over federal question cases generally has no such

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[25] *See* Snyder v. Harris, 394 U.S. 332 (1969). Both the Federal Rules (see Rule 82) and the act enabling the Supreme Court to promulgate such rules [28 U.S.C. § 2072 (1964)] provide that such rules shall not extend or limit the jurisdiction of federal courts. The Supreme Court had developed a rule that where a minimum amount in controversy was required by a federal jurisdictional statute, separate and distinct claims could not be aggregated to reach the required amount. Subsequently, Congress reenacted the diversity jurisdiction statute with a required amount in controversy. In Snyder, the Court looked to the doctrine that separate and distinct claims could not be aggregated to reach the $10,000 amount in controversy as a jurisdictional requirement, and hence interpretation of Rule 23 to permit such aggregation would be an impermissible expansion of federal jurisdiction by the Federal Rules.

[26] 28 U.S.C. § 1332 (1964).

[27] 28 U.S.C. § 1331 (1964).

[28] 28 U.S.C. § 1332(a) (1964).

requirement.[29] Hence, after *Snyder* spurious class actions can be employed freely in federal question cases. But in diversity cases the inability of the named representative of the class to aggregate his claim with the claims of absent members means that the spurious class action can be used only in those diversity cases in which the claim of the named representative exceeds $10,000.

The decision in *Snyder*, however, does not foreclose the possibility that the existence of one named representative whose claim reaches the jurisdictional amount requirement might empower the court to entertain a class action that includes other members with claims that do not satisfy the requirement. Even if such a result were permissible through a federal court's exercise of its ancillary jurisdiction,[30] it is unlikely that a claimant with such a substantial claim would be motivated to provoke a class action and burden the litigation of his claim by joinder of similar but smaller claims.[31] Similarly, while *Snyder* precludes the aggregation of separate and distinct claims for damages to reach the jurisdictional amount, the decision does not foreclose the possibility that a class action seeking only injunctive relief might

[29] While the general statute granting federal question jurisdiction to federal district courts [28 U.S.C. § 1331 (a) (1964)] requires that the matter in controversy exceed $10,000, this requirement has been eliminated from specific federal question jurisdiction statutes that embrace almost all federal question cases. *See, e.g.*, 28 U.S.C. §§ 1333 (admiralty), 1334 (bankruptcy), 1335 (statutory interpleader), 1336 (Interstate Commerce Commission), 1337 (interstate commerce and antitrust matters), 1338 (patents and copyrights), 1339 (postal matters), 1340 (internal revenue), and 1343 (civil rights). *See also* C. WRIGHT, 2d ed., *supra* note 5, § 32, at 107-08.

[30] The doctrine of ancillary jurisdiction provides that once a federal court has obtained jurisdiction over a cause, it may dispose of the whole case even though some matters for disposition would not be within the jurisdiction of the court if raised independently. Kreppendorf v. Hyde, 110 U.S. 276 (1884). Although it is the minority view, there is authority under the doctrine to support a contention that if in a multiclaim diversity case the claim of one of the parties exceeds $10,000 but the claims of other parties are below $10,000, the court may exercise jurisdiction over all of the claims if joinder is otherwise permissible and if all of the claims can be treated as one constitutional case. *See, e.g.*, Stone v. Stone, 405 F.2d 94 (4th Cir. 1968). *See also* C. WRIGHT, 2d ed., *supra* note 5, § 36, at 124.

[31] The most obvious motivation would be the hope that the plaintiff could recover his attorney's fees by prosecuting a successful class action. Despite a possible conflict with due process of law, particularly where there are absent members of the class who receive no actual notice of the pendency of the proceedings, courts have held that the equity power includes the power to award attorneys' fees to the prevailing litigant in a class action. *See, e.g.*, C. WRIGHT, 2d ed. *supra* note 5, § 72, at 317. *See also* 42 F.R.D. 169, 185 (1970), and the cases cited therein. Even with such a motivation, the likelihood that a claimant with a large claim will provoke a class action is doubtful, inasmuch as the size of his claim will make payment of his attorney's fees less of a burden. Further, this burden probably would be outweighed by the possibility that the plaintiff may incur liability for a staggering amount of additional court costs resulting from the class nature of the suit.

be tested by a monetary evaluation of the impact of such relief upon the defendant.[32] In cases since *Snyder* in which the question of aggregation in class actions seeking both injunctive relief and damages has been considered, the lower courts are split on whether the jurisdictional amount should be measured by the impact of the injunctive relief upon the defendant, which normally would equal the aggregate of the individual claims of the plaintiffs, or by the amount of damages sought by each individual plaintiff.[33]

The *Snyder* decision has not been without its detractors,[34] and several efforts have been made legislatively to reverse it, particularly in the area of consumer class actions founded upon state law.[35] Those efforts, strangely enough, point up not the error of *Snyder*, but its wisdom, for they recognize that the class action has a far greater role to play in modern law than that previously assigned to it by legal draftsmen. Before we consider this role, let us first evaluate the *Snyder* decision from a traditional view.

From the viewpoint of comity and the federal and state court systems, the *Snyder* decision was most welcome. By refusing to allow the aggregation of small claims to reach the jurisdictional amount required in diversity cases, the Court relieved an already overcrowded federal judicial system[36] of the added burden of deciding a great

[32] Where a plaintiff in a federal court action seeks only injunctive relief, it is possible that the benefit that accrues to the plaintiff will have a different value from the loss to the defendant if such relief is granted. In such situations, the law is unclear on whether the harm to the plaintiff or the harm to the defendant will be used to determine if the requisite jurisdictional amount is present. While the most authoritative view is that the test is the benefit that will accrue to the plaintiff from issuance of the injunction, there is respectable authority to the effect that if either the benefit to the plaintiff or the harm to the defendant exceeds $10,000, the requirement of the jurisdictional amount will be satisfied. *See generally* C. WRIGHT, 2d ed., *supra* note 5, § 34, at 117-19.

[33] In Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), the First Circuit, reviewing a class action in which both injunctive relief and damages were sought by the plaintiff class, stated that the test for determining the amount in controversy was "the pecuniary result to either party which the judgment would directly produce," citing as authority a leading case supporting the "plaintiff or defendant viewpoint" rule. *See* note 32 *supra*.

In Lonquist v. J. C. Penney Co., 121 F.2d 597 (10th Cir. 1970), the Tenth Circuit rejected this contention and pointed out that the Berman case involved a true class action in which aggregation of the individual damage claims was permissible, and, hence, that the language of that case, indicating that the injunctive phase of the case could be looked to in determining whether the jurisdictional amount existed, was mere dicta.

[34] *See* C. WRIGHT, 2d ed., *supra* note 5, § 72, at 316.

[35] *See* S. 1980, 91st Cong., 1st Sess. (1969), H.R. 11656, 14832, 91st Cong., 1st Sess. (1969).

[36] For a discussion of the critical state of the dockets of the United States Courts

number of small claims, the genesis of which is in state law. The decision comports with the recognized Congressional and judicial policy of limiting diversity jurisdiction,[37] and the limitation was achieved in *Snyder* without deterring enforcement of federal policy, since almost all federal question cases have been relieved of the requirement of a minimum jurisdictional amount.[38] Similarly, *Snyder* should be well received by the states, for the decision simply means that in more cases in the future interpretation and implementation of state law will be left to state courts instead of being diverted to the federal judiciary.

The argument can be made that the *Snyder* decision closes the door to federal court for a great number of foreign plaintiffs or defendants who might thereafter suffer from the local prejudice alleged sometimes to exist in state courts. Assuming a vitality to the local prejudice argument as a justification for the continuation of diversity jurisdiction, a vitality that is at best questionable,[39] *Snyder* merely avoids unequal treatment among the out-of-state litigants. Congress has decreed that an out-of-state litigant shall be relieved of such prejudice only when his claim is in excess of $10,000; the *Snyder* decision prevents the establishment, through the use of the Federal Rules, of an exception to that decree. In addition, current diversity jurisdiction requires, except in one rare instance,[40] complete diversity of citizenship between litigants on either side. In class actions brought under diversity jurisdiction, however, only the citizenship of the named representatives of the class is looked to in determining if complete diversity exists. Thus, the class action can be used to create diversity

of Appeal, see Corrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969). *See also* Wright, *Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949 (1964).

[37] This policy is evidenced by Congress' periodic increase in the jurisdictional amount required in diversity cases. The amount was raised from $500 to $2,000 in 1887, to $3,000 in 1911, and to its present level of $10,000 in 1958. *See* C. WRIGHT, 1st ed., *supra* note 10, § 32, at 90. *See also* Justice Black's discussion of this policy in Snyder v. Harris, 394 U.S. 339, 340 (1969).

[38] See authority cited note 29 *supra*.

[39] The local prejudice contention is one of the few remaining arguments in support of the need for diversity jurisdiction, but even it has been widely discredited. The most obvious criticisms of the contention are (1) that the most significant prejudices in the United States today are along racial and ethnic lines rather than geographical lines, and (2) that if local prejudice does exist, diversity jurisdiction does little to defeat it because judges and juries in federal courts generally come from the same localities as their counterparts in the state systems.

[40] Complete diversity (all plaintiffs being of diverse citizenship from all defendants) is not required by the Constitution. State Farm Fire and Cas. Co. v. Tashire, 386 U.S. 523 (1967). However, complete diversity is required by a statute granting federal district jurisdiction over diversity cases. 28 U.S.C. § 1335(a) (1) (1964). The exception is in interpleader cases brought under 28 U.S.C. § 1335 (a) (1).

where it does not exist. The *Snyder* decision merely refuses to permit access to federal court to some out-of-state litigants and deny it to others on such an illogical criterion as the similarity of their claims with the claims of others.

From the standpoint of judicial administration, the major criticism that can be leveled against *Snyder* is that it sharply limits the use of a device designed to reduce the costs of litigation and thus produce judicial efficiency. Such a criticism wilts in the face of two compelling considerations: (1) there is a net loss in judicial efficiency to the federal court system when it combines and litigates in one proceeding numerous small claims that otherwise would not reach the federal court system, and (2) assuming that a net gain in over-all judicial efficiency overrides the net loss to a single system, i.e., the federal courts, there is considerable doubt whether the class action achieves any judicial efficiency at all, or whether it achieves more of such efficiency than could be gained through the use of other existing procedural devices.

The first consideration is too clear and too compelling to warrant discussion. There can be no gain in efficiency to a judicial system from a device that brings into the system cases that would otherwise be litigated elsewhere. If the efficiency of the federal system is considered alone, as it should be, then *Snyder* was a vote for judicial efficiency.

Even more compelling is the consideration that the class action may not produce any meaningful judicial efficiency at all. The contention that use of the class action results in such efficiency by reducing the number of separate proceedings, thus reducing the cost of litigating similar small claims, has a logical ring; but a closer look reveals that at best it is rank speculation. Conceivably, statistics could be gathered that would show that a single class action disposed of a certain number of claims that might otherwise have required numerous separate suits. The inquiry should not end there, however. One must also seek the answers to such questions as these: (1) How many of the claims, because of insignificant size or the location of the parties, might otherwise have gone unprosecuted? (2) Assuming that some of the suits would have been prosecuted separately, how many of them would have been filed in relatively inexpensive small claims courts? (3) What is the total cost to society of the prosecution to conclusion of those claims that would have been filed in small claims courts as compared with the sometimes staggering cost[41] of litigating the single class action,

[41] *See, e.g.*, Philadelphia Elec. Co. v. Anaconda Am. Brass Co., *supra* note 31, where the expenses, exclusive of attorney's fees, in a class action which was settled before trial amounted to $50,000. *See also* Herbst v. Abel, 47 F.R.D. 11 (S.D.N.Y.

with its often elaborate and sometimes unnecessary provisions for multiple notices to absent members of the class?[42] (4) What judicial efficiency is lost by the decrease in the likelihood of settlement of a class action,[43] as opposed to the settlement possibilities of the individual suits, most of which might merit compromise for their nuisance value alone? (5) How many additional suits would be required, after the termination of a class action, either to determine the res judicata effect of the class suit[44] or to establish individual damages or other recovery by or against absent members of the class? One strongly suspects that if all the relevant statistics could be gathered and analyzed, they might reveal that there is little or no net gain in judicial efficiency by the employment of the class action device, particularly in the *Snyder*-type situation in which thousands of almost *de minimis* claims are aggregated.

In addition to the speculative nature of any determination that the spurious class action reduces the court costs and judicial man-hours required to dispose of the whole controversy, one must also consider whether the optimum in judicial efficiency could not be achieved simply by the use or expansion of existing devices other than the class action. The liberal concepts of joinder,[45] intervention,[46] and consolidation[47] prevailing in modern American law may be adequate to accomplish litigation in a single proceeding of the claims of those members of a class who would otherwise litigate their claims. The main advantage that the class action enjoys over intervention or permissive joinder is the power to require a litigant to prosecute his claim in a single action with others whose claims are similar. But in the

1969), where a portion of the costs of the first notice in a class action amounted to about $25,000.

[42] The current *b(3)* class action requires notice to absent members of the class ". . . who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2). Yet due process does not always require notice to absent parties in cases in which a direct and compelling interest of the sovereign will be fostered by the maintenance of the action. *See, e.g.*, Sears v. City of Akron, 246 U.S. 242 (1918); Paulsen v. Portland, 149 U.S. 30 (1893). Notice is also not required when an important state policy will be fostered by the maintenance of the action, and the absent parties will be adequately represented in the proceeding. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[43] Under the current Rule 23, a class action cannot be compromised without the approval of the court and without some type of notice to all members of the class. *See* FED. R. CIV. P. 23(e).

[44] Amended Rule 23 is silent as to the res judicata effect of a judgment under the rule, but at least one noted authority stated that the rule contemplates subsequent suits to determine such effect as to parties who did not appear in the suit. *See* C. WRIGHT, 2d ed., *supra* note 5, § 72, at 314.

[45] FED. R. CIV. P. 20.

[46] FED. R. CIV. P. 24.

[47] FED. R. CIV. P. 42(a).

b(3) action in federal courts such a litigant may exercise the option to be excluded from the class action.[48] Hence, the only advantage that the *b(3)* class action enjoys over intervention is the mechanism by which notice may be given to others with similar claims, and such a mechanism can easily be added to the current intervention device. It may be argued that some claimants may not elect to withdraw from a class action who, under permissive intervention, might not choose to intervene. Many of the claimants falling within such a category, and whose claims would be litigated by a *b(3)* class action but not by permissive intervention with notice, would be claimants who simply did not desire to press their claims in the courts. Many of the others within the category would be claimants for whom litigation in a far-away court would not be feasible. In the former case there would be a net loss in judicial efficiency, and in the latter case the insignificant additional judicial efficiency that might result from the use of the *b(3)* class action, rather than intervention with notice, may be outweighed by unfairness to the litigant.

It might be argued that permissive intervention with notice will not accomplish judicial efficiency in the types of cases falling under the *b(2)* action, one in which "the party opposing the class has acted or refused to act on grounds generally applicable to the class."[49] Under the amended rule a judgment in a *b(2)* action will be binding upon absent members even though they receive no notice of the proceeding, and absent members of the class in such an action are not permitted to opt out of the suit. But most *b(2)* actions will be directed toward redress for violation of federal constitutional rights, and it is likely that courts will either refuse to permit a prior class action to bar the subsequent assertion by an absent member of the class of such fundamental rights, or that, in such cases, the court will exercise its discretion under Rule 23 (c) (2) and order notice to such members.[50]

An equally interesting question is whether the optimum in judicial efficiency within the bounds of constitutional limitations might not best be achieved by simple extension of the doctrine of collateral estoppel. The traditional view on collateral estoppel is that a decision on any issue that was litigated between parties in one suit is binding upon the same parties or their privies in a second suit, even though the latter suit involves a different cause of action, because of the mutuality of the parties in interest.[51] The modern view, however, pro-

[48] FED. R. CIV. P. 23 (c) (2).

[49] FED. R. CIV. P. 23 (b) (2).

[50] *See, e.g.*, Norwalk Core v. Norwalk Bd. of Educ., 298 F. Supp. 210 (D. Conn. 1968).

[51] *See, e.g.*, Mackris v. Murray, 397 F.2d 74 (6th Cir. 1968); Forrester v. Southern Ry., 268 F. Supp. 194 (N.D. Ga. 1967); Life & Cas. Ins. Co. of Tenn. v. Webb, 145 S.E.2d 63 (Ga. 1965).

vides that issues that have been litigated in one suit shall be binding upon a party to such suit in a second suit against another who was not a party or privy to a party to the first suit.[52] Issues that were necessarily litigated in the first suit are thus foreclosed in the second suit to a party who was a party in the first suit, but those issues are not foreclosed to the non-party. Applying this modern view, which is gaining increased acceptance, collateral estoppel could yield judicial efficiency by making the judgment in a first suit binding upon the losing party or parties in subsequent suits by other claimants whose claims involve a common question of law or fact with the prevailing party in the first litigation.[53]

It is possible that such a use of collateral estoppel would yield as much or more judicial efficiency than would the spurious class action. While collateral estoppel, even under the modern view, will not accomplish its purpose without subsequent suits in which it is applied, the class action also does not eliminate the multitude of suits that may be required after the completion of the action, either to determine the amounts due the individual claimants, or to determine the res judicata effect of the judgment when it is sought to be applied for or against those members of the class who were not named parties in the action. There appears to be no significant difference in the litigation of such subsequent suits, regardless of whether the res judicata bar is being applied from collateral estoppel or from a prior class action.

In addition, widespread adoption of the modern view of collateral estoppel may discourage the subsequent filing of individual suits by parties similarly situated and thus might yield as much judicial efficiency as the class action, particularly when the enormous costs of litigation of a class action are considered.

Assuming that collateral estoppel would yield at least equal judicial efficiency, its use would result in a more satisfactory method of producing such efficiency than the current class action. Both concepts, in their application, may conflict with due process of law, particularly when applied to persons who were neither parties to, nor received actual notice of, the first suit. There is one fundamental difference, however, between the two. In the absence of actual notice to the absent party, adequate representation of such party by the claimant similarly situated

[52] Technograph Printed Circuits, Ltd. v. United States, 372 F.2d 969 (Ct. Cl. 1967); State of Maryland v. Capital Airlines, 267 F. Supp. 298 (D. Md. 1967); State of Michigan v. Morton Salt, 259 F. Supp. 35 (D. Minn. 1966); United States v. United Air Lines, 216 F. Supp. 709 (E.D. Wash. 1962).

[53] *See* cases cited note 51 *supra*. Much of the acceptance is due to the articulate explanations of the doctrine by Professor Allen D. Vestal. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964).

who conducts the litigation is usually essential to a determination of whether due process has been met.[54] The court can make a more meaningful determination of the adequacy of the representation after it has occurred, as in collateral estoppel, rather than before, as in class actions.

One might thus conclude that the beneficial effects of *Snyder* upon state-federal relations and the federal court system easily outweigh any disadvantages resulting from the curtailment of the use of the spurious class action in federal diversity cases. But what of the future of the spurious class action, and what of the ongoing efforts to reverse by legislation the *Snyder* decision? The answers to these questions hinge upon a proper understanding of the important role that the spurious class action can play in modern law. This role, slighted and almost totally overlooked by the revisers of Rule 23[55] but recognized by some in recent years,[56] is that of a procedural tool for the aggregation of claims where such aggregation is essential to the enforcement of an important substantive policy of the sovereign.

The typical example is one in which a large group of consumers sustains damages from an illegal trade practice, such as deceptive advertising, sale of defective products, the collection of usurious rates, or

[54] Adequacy of representation is essential to the maintenance of a class action under the current federal rule. *See* FED. R. CIV. P. 23 (a) (4). Prior to formulation of current requirements of notice to litigants under the due process clause of the Fourteenth Amendment, the emphasis in class actions was not upon any necessity for notice to the absent parties but was upon the adequacy of representation of the class by the named representative. As noted an authority as Story assumed that if the representation was adequate, the members of the class, although they received no notice, would be bound by the decision in a class action. *See* J. STORY, *supra* note 8, at 127-42. Although the Supreme Court has not spoken directly on the subject, it is probable that either actual notice to absent parties, or adequate representation, is required by due process.

[55] The revisers of Rule 23, in their advisory note, emphasized the role of the *b(3)* action as a procedural tool to be used for the achievement of judicial efficiency. *See* note 15 *supra.* Subsequently, in discussing the findings that a court should consider in determining whether the purported class action would be "superior to other methods for the fair and efficient adjudication of the controversy," the revisers referred in passing to a consideration of whether "the amounts at stake for individuals [would] be so small that separate suits would be impracticable" rather than impossible or improbable, indicating that here, too, the revisers may have had judicial efficiency rather than implementation of substantive policy in mind.

[56] *See, e.g.*, Tydings, *Fair Play for Consumers*, TRIAL MAGAZINE, February/March, 1970. In Darr v. Yellow Cab Co., 433 P.2d 732 (1967), the California Supreme Court, permitting a class action by taxicab customers to recover illegal overcharges by taxi companies, recognized the potential of the use of a class action to stimulate the collection of claims that otherwise would go unprosecuted. *See also* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Holstein v. Montgomery Ward & Co., No. 68, Ch. 275 (Ill. Cir. Ct. Cook County 1969); C. WRIGHT, 2d ed., *supra* note 5, § 72.

illegal finance charges, but the damage sustained by each consumer is so negligible that individual suits for damages are unlikely to be prosecuted. In such a case, the criminal law may impose some sanction upon the wrongdoers, but the criminal law frequently does not afford sufficient deterrance,[57] and it grants the victims no compensation for the harm they have sustained.[58] Injunctive relief may be available, but such relief only prevents future violations and leaves the victims uncompensated. In addition, it often produces a victim who is financially weakened by his efforts to obtain injunctive relief. The most effective remedy in such a case is an action for compensatory damages,[59] which has been provided by the sovereign to serve a dual purpose: compensation to the victim and deterrence to the wrongdoer. But neither deterrence nor compensation can be achieved through this remedy if, as is usually the case, the victims are unlikely to prosecute suits for damages because the amount of the recovery by each individual claimant is too small.

The most effective use of the spurious type of class action is as a device for the aggregation of these small claims into one suit,[60] thus

[57] Criminal law frequently affords no deterrence either because overburdened prosecutors will not reach minor, non-violent crimes, or because the penalty that is imposed is so insignificant that it constitutes to the wrongdoer nothing more than a cost of doing business. In addition, there is a stigma attached to criminal law which makes it less likely that a judge or jury will punish the peripheral wrongdoers.

[58] In addition, there are policy factors that dictate that the criminal law should not be expanded to furnish added deterrence in the situation posed. One is that a continued expansion of the criminal law may result in a weakening of its overall effectiveness as a deterrent. Another is that diversion of deterrence from the criminal law to the civil law reduces the amount of resources that a state must expend to achieve the desired deterrent effect by transferring the greater part of the cost of the judicial process from the state to the wrongdoer and his victims.

[59] It may be argued that implementation of a state's substantive policy can be effected more readily by legislation sanctioning punitive damages in those areas in which the legislature determines that additional deterrence through civil law is desirable. If the actual damages sustained are significant, then an award of punitive damages would be unnecessary and perhaps might produce an undesirable amount of over-deterrence. Similarly, legislation designed to permit punitive damages only in certain types of cases in which numerous small claimants are unlikely to prosecute their claims for actual damages might create problems of distinction and draftsmanship far greater than that resulting from a properly tailored class action. Finally, even if the concept of punitive damages could be stretched to fit the remedy sought, a court would be unable to determine how much punitive damages should be awarded in one suit until it determines how many similar suits will be filed and how much damages will be awarded in the other suits.

[60] It might be contended that such a result could be best achieved by establishment of an administrative agency to process such small claims. There are, however, several reasons why such a procedure would be unsatisfactory. Such a procedure would deprive the claimants of such advantages as the use of discovery devices and

making litigation against the wrongdoer both probable and economically feasible. The important value of such a class action is not as a tool to achieve judicial efficiency—a function that, as we have seen, it does not adequately perform—but as a device that encourages prosecution of individual claims for damages that are so small that they otherwise would not be prosecuted. Some courts, federal and state, already have recognized this value.[61] The California Supreme Court, in a recent case upholding the use of the class action to cumulate a multitude of *de minimis* claims, stated:

> [A]bsent a class suit, recovery by any of the individual taxicab users is unlikely. The Complaint alleges that there is a relatively small loss to each individual class member. In such a case separate actions would be economically infeasible. Joinder of plaintiffs would be virtually impossible in this case. It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit the allegedly injured parties to recover the amount of their overpayments is to be preferred over the foregoing alternative.[62]

Early acceptance of efforts to use the class action to provide deterrence of conduct that the sovereign has condemned has been limited to consumer protection, but it should not be so restricted. There are other areas of conduct that cannot be deterred effectively through prosecution of damage suits because of the insignificant size of the individual claims. Among these are air and water pollution and other kinds of tortious conduct toward large groups of people.[63]

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the right of trial by jury. Creation of administrative agencies with the powers needed to remove those disadvantages would be more costly than the added burden placed upon the courts in the litigation of class actions combining small claims that might otherwise go unprosecuted.

[61] *See* Shulman v. Ritzenberg, 47 F.R.D. 202 (D.D.C. 1969), wherein the court stated that ". . . the very spirit of the Rule 23 class action . . . is to provide a means of vindicating small claims." *Id.* at 206. *See also* Dolgow v. Anderson; Darr v. Yellow Cab Co., *supra* note 56.

[62] Darr v. Yellow Cab Co., *supra* note 56, at 746.

[63] Drafting of a spurious class action statute that will implement the substantive policy of a state by encouraging the litigation of small claims that might otherwise go unprosecuted is beyond the scope of this paper. However, certain procedures would appear desirable. These procedures are (1) permitting a judge to provoke a class action upon his own motion; (2) awarding an additional recovery beyond plaintiff's claim, either from the defendant as punitive damages, or out of the total recovered for the class, to the successful plaintiff; (3) permitting the judge to waive notice to absent claimants (within the limits of due process); (4) granting the judge discretion to require the defendant to pay the initial costs of giving notice, where notice is required by due process and where a prima facie showing of liability has been made, and (5) in cases in which the amount of damages sustained by absent claimants can be shown, requiring the defendant to pay such damages into the registry of the court, subject to subsequent withdrawal upon the appearance of the absent claimant or as an escheat to the state.

If the Court in *Snyder* discovered, as we suspect, that the true function of the spurious class action is as a device for the implementation of sovereign policy by encouraging prosecution of large numbers of small civil claims that might otherwise go unprosecuted, then the *Snyder* decision merely rejected the use of a federal class action, and hence the use of the federal courts, to implement the substantive policy of a state. The use of the device to implement federal policy in federal courts remains undisturbed, since no jurisdictional amount is required in almost all federal question cases. The import of *Snyder* is immaterial in such cases. Perhaps this was the rationale that prompted Justice Black to write in *Snyder*:

> [W]hile the class action device serves a useful function across the entire range of legal questions, the jurisdictional amount requirement applies almost exclusively to controversies based upon diversity of citizenship. *A large part of those matters involving federal questions can be brought, by way of class actions or otherwise, without regard to the amount in controversy. Suits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state court.* The underlying claims in the two cases before us, for example, will be determined exclusively on the basis of Missouri and Kansas law, respectively. (emphasis added).[64]

Thus *Snyder* properly bounces back to each of the states the question of whether such state desires to employ the spurious class action as a method of implementation of its substantive policies. It is difficult to question the wisdom of a decision that has such an effect.

Some of the early efforts to overrule *Snyder* apparently have been prompted by this recognition of the proper role that the spurious class action must play in modern law. The most significant has been the proposal by Senator Joseph D. Tydings of Maryland, which is currently pending in Congress.[65] The Tydings proposal would permit consumer class actions in federal courts without regard to the requirement of a jurisdictional amount in all suits to redress violations of either federal or state laws designed to protect consumers from illegal trade practices. Early debates on the merits of the proposal apparently have centered around a controversial provision for attorney's fees, a debate that may be moot,[66] and around the desirability of first requiring

[64] Snyder v. Harris, 394 U.S. 332, 341 (1969).

[65] S. 1980, 91st Cong., 1st Sess. (1969).

[66] Federal courts, sitting as courts of law and equity, may have the inherent power to award attorney's fees to successful representatives in class actions. *See* note 25 *supra*.

In one recent case, the district court held that the winning attorneys were entitled to a fee based upon a percentage of the total recovery by the class. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 47 F.R.D. 557 (D. Pa. 1969).

a successful government suit against the defendant before maintenance of the consumer class action. A more important consideration, however, is the damage that such a proposal might do to the federal system and to the fullest development of the spurious class action.

That part of the Tydings proposal that permits consumer class actions in suits alleging a violation of federal law poses no problem since such suits normally would be federal question cases outside the thrust of the *Snyder* decision. But the proposal to permit consumer class actions for suits alleging violation of state laws without regard to diversity of citizenship or the resultant requirement of a jurisdictional amount, i.e., a legislative reversal of *Snyder*, poses several major problems.

One problem, which also exists under *Snyder* in class actions involving numerous claims in excess of $10,000 under diversity jurisdiction, results from the application of state conflicts law, under the *Klaxon* doctrine,[67] to such actions. Many consumer actions will involve claimants from several states, and many states have conflicts rules that could require application of the laws of different states to claimants who otherwise would be members of the same class.[68] Such a result might arise, for example, in a class action involving sales contracts, if the conflicts law of the forum state dictates application of the law of the place of the making of the contract. In such a case the federal court entertaining a class action might subdivide the classes and end up with as many as fifty class actions in one proceeding. It then may be compelled to dismiss many of the sub-class actions because of the lack of a proper representative, sending parts of the controversy to as many as forty-nine other federal or state courts. If the courts attempted to avoid such a problem by looking only to the place of the making of the contract with the named representative, then injustice might result to absent members whose rights then might be determined by the law of a state with which neither they nor their transaction with the defendant has any connection. As a body of law develops, consumer class actions could degenerate into nationwide searches for the most favorable forums.

[67] Klaxon Co. v. Stenton Elec. Mfg. Co., 313 U.S. 487 (1941). This doctrine directs each federal court in diversity cases to apply the conflict-of-law rule of the state in which it sits.

[68] Modern conflict-of-laws theory has directed attention from the situs of the wrong, the location of the property, the place of the making of a contract and other nonfunctional concepts to functional concepts which can be generally described as the place of the most significant relationship. *See, e.g.*, Haag v. Barnes, 175 N.E.2d 441 (N.Y. 1961); Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954). While the theories under the heading "significant relationship" are by no means homogeneous, it will be unlikely that a cause of action embracing wrongs to plaintiffs from different states will be settled under one rule of law.

The consumer class action proposals currently being considered by Congress do violence to the concept of comity that has played a major role in shaping the boundaries of the jurisdiction of federal courts.[69] The proposal, if enacted, would deprive the states of part of their lawmaking function—judicial interpretation of state statutes—in areas that traditionally are within the domain of state interest. In addition, class actions will be made available to claimants whose rights are derived through state law, but the state lawmakers will be deprived of the opportunity to determine whether the added deterrence resulting from use of the spurious class action is either necessary or desirable. And all of this grating intrusion into the state's domain would be accomplished by an act of questionable constitutionality[70] and to protect a federal interest that has not yet reached a level warranting careful consideration by Congress and the adoption of specific federal substantive law.

In addition to their undesirable effects upon the federal system and upon comity, the current proposals are likely to constitute a stumbling block in the path of the development of the spurious type of class action as a method of implementing state policy. The value of such a class action extends beyond consumer protection, but it is the consumer who is most likely to agitate for such a remedy. A federal statute, then, will reduce much of the pressure that otherwise might be gen-

[69] Comity is frequently used to describe the policy consideration that branches of the federal sovereign, particularly its judiciary, should avoid whenever possible any needless conflict with the administration by a state of its own affairs. It underlies the doctrine of abstention by which federal courts sometimes withhold the exercise of equity jurisdiction to permit state courts to make initial determinations of state law. The same policy consideration apparently is manifested in the Erie doctrine which requires that a federal court in a diversity case apply the substantive law of the state in which it sits. Congressional recognition of this policy consideration is evidenced by the Anti-Injunction Act [28 U.S.C. § 2283 (1964)] which prohibits federal courts from enjoining state court proceedings except in certain cases.

[70] The Tydings proposal would grant jurisdiction to federal district courts over class actions based upon state law without regard to diversity of citizenship. The jurisdiction thus granted would lack a constitutional basis unless the Supreme Court subsequently interprets the language of the proposal as encompassing both the creation of federal substantive law and the granting of jurisdiction to federal courts. Such a construction was used by the Court to sustain a similar statute in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

If the constitutional question is avoided by such a construction, then presumably the federal courts would be left to formulate a federal common law for the protection of consumers which presumably would differ from state to state, depending upon the nature and extent of each state's consumer protection laws. Another undesirable result would be an unwarranted abdication by Congress to the federal courts and to the states of the bulk of its law-making power in an area in which it has recently legislated and in which further nation-wide legislation may be desirable.

erated to encourage state legislatures to provide class action remedies in the many and varied situations that demand such a remedy. Additionally, state legislatures are less likely to act, even in the consumer field, if federal remedies are available. Ultimately, the majority of American states that have adopted spurious class action devices may be encouraged to let them remain as ineffective methods of achieving judicial efficiency, and the remainder of the states will be discouraged from adopting any kind of class action at all.

Snyder stands as one of the most significant procedural decisions of recent years. It continues the wise Congressional and judicial trend of limiting diversity jurisdiction as a method of properly allocating jurisdiction between federal and state courts and reducing the workload of the overcrowded federal system by removing from the jurisdiction of federal courts the kinds of cases that do not belong there. By sharply limiting the use of the class action in diveristy cases, *Snyder* has prompted more courts, lawmakers and scholars to recognize that the most effective use of the spurious class action is not, as the federal rulemakers have erroneously concluded, as a means of achieving judicial efficiency, but as an effective and efficient method of implementing the substantive policy of the sovereign.

Armed with such a realization, both the state and federal lawmakers may now focus upon the development of the class action to its fullest use. The proposal for a federal consumer class action that borrows state substantive laws may distort the view of state legislatures and result in a delay or defeat of the proper and necessary development of the class action. One hopes that any federal class action that is adopted, for protection of consumers or of other claimants who are denied effective redress because of the insignificant size of their individual claims, will rest upon federal substantive law reflecting considered federal policy, and that in the absence of such law, or as a supplement to it, the state systems will adopt their own procedures that will continue to recast the spurious class action in its rightful role.

THE OBLIGATION TO SETTLE WITHIN POLICY LIMITS

*W. Thad Cochran**

I. Introduction

Any practitioner who handles claims for damages where the defendant is covered by a liability insurance policy is certain to be confronted, at some time, with a demand for judgment in excess of the limits of the coverage. The situation is illustrated by a suit for damages in the sum of $20,000 against a person whose liability insurance coverage is limited to $10,000. If the plaintiff offers to take $9,000 in settlement, and this offer is rejected by the company, what is the nature of the liability, if any, of the company to the insured when a judgment is subsequently entered for the plaintiff in the amount of $15,000? The attorney will find that the law governing the obligation of the insurer to compromise the claim within the policy limits is at least unsettled, if not totally confusing.

II. The General Rule

What may have been thought earlier to be an "option" to settle,[1] is now more often referred to as a "duty."[2] Since the insurance company has exclusive power to make the settlement decision, and conflict with the insured sometimes develops over the desirability of making such a settlement, the authority of the company under these circumstances must be accompanied by responsibility for its exercise.[3] One authority says this duty is "implied in the contract."[4] The obligation of the insurer actually arises out of the contractual relationship of the parties and not from the terms of the insurance policy.[5] Therefore, the duty sounds in tort rather than in contract.[6]

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[1] *See, e.g.*, Georgia Cas. Co. v. Cotton Mills Prod. Co., 159 Miss. 396, 132 So. 73 (1931); C. Schmidt & Sons Brewing Co. v. Travelers Ins. Co., 244 Pa. 286, 90 A. 653 (1914).

[2] *See, e.g.*, Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952).

[3] *See* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv. L. Rev. 1136 (1954).

[4] *See* 8 D. Blashfield, Automobile Law and Practice § 343.4, at 325 (3d ed. 1966).

[5] American Mut. Liab. Ins. Co. v. Cooper, 61 F.2d 466 (5th Cir. 1932), *cert. denied*, 289 U.S. 763 (1933).

[6] Fidelity & Cas. Co. v. Gault, 196 F.2d 329 (5th Cir. 1952).

The usual policy provision concerning settlement implies a permission to settle rather than an obligation.[7] However, the law favors settlement of claims without recourse to litigation.[8] The permissive form of the policy language notwithstanding, all of the authorities now seem to agree that an insured may recover from his insurer for a breach of this duty on the grounds of bad faith or fraud, regardless of policy limitations as to amount.[9]

It is the definition of the obligation itself which is so difficult to isolate. Some courts hold that good faith on the part of the company is all that is required,[10] while others seem to say the standard is more exacting.[11] The number of courts holding that both good faith and ordinary care apply is growing.[12]

In approaching the problem there is a tendency to restrict the analysis of the cases by grouping them into lists representing those which adhere to either the good faith test or the negligence test.[13] However, there is a more relevant classification, which is the degree of consideration which the company must give the insured's interests in relation to its own. Some early courts held that the company is required to consult the interests of the insured—but not to prejudice its own interests.[14] Other cases can be found which say that the company is obligated to give more consideration to the interests of the insured than to its own.[15]

However, the more recent cases state that in deciding whether a settlement offer is to be accepted or rejected, the company must give the interests of the insured the same consideration it gives its own, and failure to do so constitutes bad faith which renders the insurer liable for damages if judgment against the insured exceeds the amount of the coverage.[16] Therefore, whether a court pays homage to the bad

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[7] N. Risjord & J. Austin, *Standard Provisions*, in Automobile Liability Insurance Cases 56 (1957).

[8] *See, e.g.*, Employers Mut. Cas. Co. v. Chicago St. P., M. & O. Ry., 235 Minn. 304, 50 N.W.2d 689 (1951).

[9] Cowden v. Aetna Cas. & Sur. Co., 390 Pa. 459, 134 A.2d 223 (1957).

[10] *See, e.g.*, Hart v. Republic Mut. Ins. Co., 152 Ohio St. 185, 87 N.E.2d 347 (1949).

[11] *See, e.g.*, Wilson v. Aetna Cas. & Sur. Co., 145 Me. 370, 76 A.2d 111 (1950).

[12] *See, e.g.*, Dumas v. Hartford Accident & Indem. Co., 94 N.H. 484, 56 A.2d 57 (1947).

[13] *See, e.g.*, Locke & Austin, *Handling the Excess Coverage Situation for the Insurer*, 36 Ins. Counsel J. 60 (1969).

[14] *See* Foremost Dairies v. Campbell Coal Co., 57 Ga. App. 500, 196 S.E. 279 (1938); Long v. Union Indem. Co., 277 Mass. 428, 178 N.E. 737 (1931); Wakefield v. Globe Indem. Co., 246 Mich. 645, 225 N.W. 643 (1929).

[15] *See, e.g.*, Zumwalt v. Utilities Ins. Co., 360 Mo. 362, 228 S.W.2d 750 (1950).

[16] *See* Prickett v. Hawkeye—Security Ins. Co., 282 F.2d 294 (10th Cir. 1960); Ballard v. Citizens Cas. Co., 196 F.2d 96 (7th Cir. 1952).

faith or the negligence theory is of little importance if it adheres to the rule requiring that paramount consideration be given to one party's interests at the expense of the other.[17]

There are two aspects of the company's duty: (1) whether it must give paramount, equal or less weight to the interests of the insured than to its own, and (2) whether it must merely exercise good faith or ordinary care as well.[18] These components of the insurer's duty are easily overlooked by some of the better authorities. For instance, one text states:

> As the champion of the insured, it [the insurer] must consider as paramount his interests, rather than its own, and may not gamble with his funds. Its relationship is somewhat of a fidiciary one, and the liability is greater than indicated by some of the earlier holdings.[19]

Later in the same work the editor says:

> The mere refusal of an insurer to settle a claim for an amount within the policy limits does not, without more, render the insurer liable for a subsequent judgment which exceeds the policy limits.[20]

These are inconsistent observations. If the insurer gave more weight to the interests of the insured in a case involving the possibility of a judgment in excess of the coverage, the case would be settled within the limits if possible. To impose such an obligation on a company would be tantamount to holding the insurer strictly liable for any excess judgment. This does not seem to be the law. A cogent argument against this approach is found in an early case:

> The gift of prophesy has never been bestowed on ordinary mortals, and as yet their vision has not reached such a state of perfection that they have the power to predict what will be the verdict of the jury on disputed facts in a personal injury case. The verdict represents the composite judgment of the assenting jurors, and oftentimes is but the resultant expression of conflicting views. . . . Calling it negligence for an agent not to devine what would be the result of a jury trial on disputed evidence, and permitting a jury to determine the question not solely on the facts as presented to him, but in the light of the subsequent verdict of the jury, would carry his responsibility beyond the bounds of reason and further than the demands of justice require.[21]

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[17] *See* Keeton, *supra* note 3, for an extremely worthwhile general discussion of the problem.

[18] *Id.*

[19] 7A J. APPLEMAN, INSURANCE LAW & PRACTICE § 4711, at 553 (1962).

[20] *Id.* at 558.

[21] Georgia Cas. Co. v. Mann, 242 Ky. 447, 46 S.W.2d 777, 779 (1932).

The recent cases indicate that the approach now taken by most of the courts is to require the insurer to give equal consideration to the interest of the insured and to exercise good faith in deciding whether or not an offer of settlement is to be accepted or rejected where there is conflict between the interests of the insured and the insurer.[22] However, there is authority for the proposition that a company may be held liable for an excess judgment if it has been guilty of mere negligence in refusing to settle within the limits,[23] and one recent case has intimated that the doctrine of strict liability may be applicable.[24]

In *Crisci v. Security Insurance Co.*,[25] which has attracted much comment,[26] the court awarded an insured $91,000, plus $25,000 for mental suffering, when a judgment was entered for $101,000 on a claim which could have been settled for $9,000 before trial. The insured's coverage was limited to $10,000. The decision contains some very interesting dicta:

> [T]he rejection of a settlement within the limits where there is any danger of a judgment in excess of the limits can be justified, if at all, only on the basis of the interest of the insurer, and, in light of the common knowledge that settlement is one of the usual methods by which an insured receives protection under a liability policy, it may not be unreasonable for an insured who purchases a policy with limits to believe that a sum of money equal to the limits is available and will be used so as to avoid liability on his part with regard to any covered accident. In view of such expectation an insurer should not be permitted to further its own interests by rejecting opportunities to settle within the policy limits unless it is also willing to absorb losses which may result from its failure to settle.[27]

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[22] Note, *Insurer's Liability for Refusal to Settle*, 42 ST. JOHN'S L. REV. 544 (1968).

[23] *See, e.g.*, Stillwell v. Parsons, 51 Del. 342, 145 A.2d 397 (1958); Douglas v. United States Fidelity & Guar. Co., 81 N.H. 371, 127 A. 708 (1924).

[24] *See* Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968), where it is indicated that the insurance attorney can be personally liable for carrier's failure to settle; Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

[25] 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

[26] Comment, *Insurance—Liability of Insurer for Excess Judgement*, 32 A.T.L. L.J. 350 (1968); Snow, *Excess Liability—Crisci and Lysick*, 36 INS. COUNSEL J. 51 (1969); Comment, *Insurance—Excess Recovery—Liability Insurer Who Refused Settlement Within The Policy Limits Held Liable For Excess Recovery and Mental Damages*, 43 N.Y.U. L. REV. 199 (1968); Note, *Insurer's Liability for Refusal to Settle*, 42 ST. JOHN'S L. REV. 544 (1968); Note, *Insurer's Strict Liability for Entire Judgement*, 13 S.D. L. REV. 375 (1968); Comment, *Insurer's Liability for Wrongful Refusal to Defend or Settle*, 36 U.M.K.C. L. REV. 304 (1968); Comment, *Crisci's Dicta of Strict Liability for Insurer's Failure to Settle: A Move Toward Rational Settlement Behavior*, 43 WASH. L. REV. 799 (1968).

[27] Crisci v. Security Ins. Co., *supra* note 24, at 177, 58 Cal. Rptr. at 17.

In commenting on the proposal of counsel that a rule of strict liability be adopted in such cases, the court said:

> [I]t is not entirely clear that the proposed rule would place a burden on insurers substantially greater than that which is present under existing law. The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim.[28]

The court refrained from expressly adopting the rule of strict liability, saying that it was deciding in favor of the insured because the company breached its duty to consider the interests of the insured in the proposed settlement and because its rejection of the settlement was unreasonable under the circumstances.[29] This indicates that the California court probably will, in most circumstances, require greater weight be given to the interest of the insured than to the interest of the insurer.

III. Factors Affecting Liability

The most practical way to approach this problem is to analyze the various factors considered by the courts as affecting liability of a company where there is a conflict of interests involved. While some courts recognize liability for negligence,[30] the better rule is that negligence is to be considered as a factor which tends to establish liability for bad faith.[31] The negligence involved is the failure to use ordinary care in reaching a decision to litigate rather than to settle.[32]

The plaintiff's ability to prove liability and damages in excess of the policy limits is the primary consideration in deciding whether a settlement offer should be accepted or rejected. Therefore, where

[28] *Id.* at 177, 58 Cal. Rptr. at 17.

[29] *Id.* at 176, 177, 58 Cal. Rptr. at 16, 17.

[30] *See, e.g.*, Seguros Tepeyec, S.A., Compania Mexicana de Seguros Generales v. Bostrom, 347 F.2d 168 (5th Cir. 1965) (applying Texas law); Anderson v. St. Paul Mercury Indem. Co., 340 F.2d 406 (7th Cir. 1965).

[31] *See, e.g.*, American Fidelity & Cas. Co. v. Greyhound Corp., 258 F.2d 709 (5th Cir. 1958) (applying Florida law); Davy v. Public Nat'l Ins. Co., 181 Cal. App. 2d 387, 5 Cal. Rptr. 488 (1960); Henke v. Iowa Home Mut. Cas. Co., 250 Iowa 1123, 97 N.W.2d 168 (1959); Bennett v. Conrady, 180 Kan. 485, 305 P.2d 823 (1957); Radcliffe v. Franklin Nat'l Ins. Co., 208 Ore. 1, 298 P.2d 1002 (1956); Perry v. United States Fidelity & Guar. Co., 49 Tenn. App. 662, 359 S.W.2d 1 (1962); Baker v. Northwestern Nat'l Cas. Co., 26 Wis. 2d 306, 132 N.W.2d 493 (1965). *See also* Judge Coleman's majority opinion in State Farm Mut. Auto. Co. v. Smoot, 381 F.2d 331 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968), where mismanagement of litigation by the insurer's counsel seems to have been a primary consideration in finding evidence of bad faith.

[32] *See, e.g.*, Baker v. Northwestern Nat'l Cas. Co., *supra* note 31.

there is strong evidence on these issues, this fact tends to indicate that a decision to litigate was made in bad faith, thus resulting in liability for the excess judgment.[33] It has also been held that the failure of an insurer to give due regard to the facts which support the plaintiff's case constitutes negligence.[34] On the other hand, where there are real issues, as shown by the facts, on the question of liability or the extent of damages, the rejecting of a compromise offer will not be considered negligence.[35]

It has been recognized by several courts that another factor tending to establish liability is a company's attempt to induce the insured to contribute to a settlement.[36] Such action is coercive and threatening, particularly where it is likely that an excess judgment will result if the case is not settled. In such cases the company usually is found to be trying to keep from paying its full limits on a case of almost certain liability.

The failure of an insurer to exercise care and diligence in investigating a case has been considered sufficient evidence to support excess liability.[37] Some courts see this as constituting bad faith,[38] while others look upon it as indicating negligence.[39]

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[33] *See, e.g.*, Potomac Ins. Co. v. Wilkins Co., 376 F.2d 425 (10th Cir. 1967); United States Fidelity & Guar. Co. v. Canale, 257 F.2d 138 (6th Cir. 1958) (applying Tennessee law); Springer v. Citizens Cas. Co., 246 F.2d 123 (5th Cir. 1957) (applying Florida law); Alabama Farm Bureau Mut. Cas. Ins. Co. v. Dalrymple, 270 Ala. 119, 116 So. 2d 924 (1959); Farmers Ins. Exchange v. Henderson, 82 Ariz. 335, 313 P.2d 404 (1957); Boerger v. American Gen. Ins. Co., 257 Minn. 72, 100 N.W.2d 133 (1959); Western Cas. & Sur. Co. v. Fowler, 390 P.2d 602 (Wyo. 1964).

[34] *See, e.g.*, Smith v. Transit Cas. Co., 281 F. Supp. 661 (E.D. Tex. 1968).

[35] *See, e.g.*, Wilson v. Aetna Cas. & Sur. Co., *supra* note 11.

[36] *See, e.g.*, Maryland Cas. Co. v. Cook-O'Brien Constr. Co., 69 F.2d 462 (8th Cir.), *cert. denied*, 293 U.S. 569 (1934); Ferris v. Employers Mut. Cas. Co., 255 Iowa 511, 122 N.W.2d 263 (1963); McCombs v. Fidelity & Cas. Co., 231 Mo. App. 1206, 89 S.W.2d 114 (1935); J. Spong Baking Co. v. Trinity Universal Ins. Co., 45 Ohio L. Abs. 577, 68 N.E.2d 122 (1946); *cf.* Davis v. Maryland Cas. Co., 76 La. App. 253, 133 So. 769 (1931). *Contra*, Levin v. New England Cas. Co., 101 Misc. 402, 166 N.Y.S. 1055 (1917), *aff'd*, 187 App. Div. 935, 174 N.Y.S. 910 (1919). *But see* Ging v. American Liab. Ins. Co., No. 27336 (5th Cir, Feb. 27, 1970), where Judge Clark suggests that the insured should have been invited to participate in the proposed settlement.

[37] *See, e.g.*, Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1958).

[38] *See*, e.g., Ballard v. Citizens Cas. Co., 196 F.2d 96 (7th Cir. 1952); Maryland Cas. Co. v. Elmira Coal Co., 69 F.2d 616 (8th Cir. 1934); American Mut. Liab. Ins. Co. v. Cooper, 61 F.2d 446 (5th Cir. 1932), *cert. denied*, 289 U.S. 736 (1933); Murach v. Massachusetts Bonding & Ins. Co., 339 Mass. 184, 158 N.E.2d 338 (1959); Radio Taxi Serv., Inc. v. Lincoln Mut. Ins. Co., 31 N.J. 299, 157 A.2d 319 (1960); Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1951); Hilker v. Western Auto Ins. Co., 204 Wis. 1, 231 N.W. 257, 235 N.W. 413 (1930).

[39] *See, e.g.*, Maryland Cas. Co. v. Wyoming Valley Paper Co., 84 F.2d 633 (1st Cir. 1936); Home Indem. Co. v. Snowden, 223 Ark. 64, 264 S.W.2d 642 (1954).

Refusing to compromise when the insurer's own counsel has recommended compromise has been held to be a consideration in determining liability.[40] However, there have been cases decided which indicate that the rejection of its attorney's advice to settle may not be enough, standing alone, to support a finding of excess liability, particularly where there is a real question as to the insured's liability.[41]

Since the courts have held that a company has a strong obligation to accept an offer within the policy limits where a verdict has been returned against the insured in excess of those limits,[42] the circumstance in which the settlement offer is made is a factor to be considered. Similarly, it has been held that the company has a "greater duty" to settle where a settlement offer has been made within the limits after a trial verdict in excess of the limits.[43] But, where the act of taking the appeal was reasonable under the circumstances,[44] and where counsel advised that the verdict would probably be reduced on appeal,[45] it was held that the appeals were in good faith and did not subject the companies to liability in excess of the limits of the policies.[46]

Failure of the insurer to communicate to the insured the fact that a compromise offer has been received may be regarded as evidence of the company's liability in an action for wrongful refusal to settle.[47]

[40] *See, e.g.*, Royal Transit v. Central Sur. & Ins. Corp., 168 F.2d 345 (7th Cir.), *cert. denied*, 335 U.S. 844 (1948); Kaudern v. Allstate Ins. Co., 277 F. Supp. 83 (D.N.J. 1967); Olympia Fields Country Club v. Bankers Indem. Ins. Co., 325 Ill. App. 649, 60 N.E.2d 896 (1945); Henke v. Iowa Home Mut. Cas. Co., *supra* note 31; Johnson v. Hardware Mut. Cas. Co., 108 Vt. 269, 187 A. 788 (1936).

[41] *See, e.g.*, Hoyt v. Factory Mut. Liab. Ins. Co., 120 Conn. 156, 179 A. 842 (1935); Lawson & Nelson S. & D. Co. v. Associated Indem. Corp., 204 Minn. 50, 282 N.W. 481 (1938); Georgia Cas. Co. v. Cotton Mills Prod. Co., 159 Miss. 396, 132 So. 73 (1931); Aetna Cas. & Sur. Co. v. Price, 206 Va. 749, 146 S.E.2d 220 (1966).

[42] *See, e.g.*, Hazebrigg v. American Fidelity & Cas. Co., 241 F.2d 871 (10th Cir. 1957).

[43] *See, e.g.*, Foundation Reserve Ins. Co. v. Kelly, 388 F.2d 528 (10th Cir. 1968); Bowers v. Camden Fire Ins. Ass'n, 51 N.J. 62, 237 A.2d 857 (1968); Boling v. New Amsterdam Cas. Co., 173 Okla. 160, 46 P.2d 916 (1935). *Contra*, Farm Bureau Mut. Auto. Ins. Co. v. Violano, 123 F.2d 692 (2d Cir. 1941), *cert. denied*, 316 U.S. 672 (1942).

[44] Norwood v. Travelers Ins. Co., 204 Minn. 595, 284 N.W. 785 (1939).

[45] Georgia Cas. v. Cotton Mills Prod. Co., *supra* note 41.

[46] *See also* Davis v. Maryland Cas. Co., 16 La. App. 253, 133 So. 769 (1931), as to right to demand participation by insured after judgement in lieu of taking appeal.

[47] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Smoot, 381 F.2d 331 (5th Cir. 1967); American Fidelity & Cas. Co. v. Greyhound Corp., 258 F.2d 709 (5th Cir. 1958); Home Indem. Co. v. Williamson, 183 F.2d 572 (5th Cir. 1950); Maryland Cas. Co. v. Wyoming Valley Paper Co., 84 F.2d 633 (1st Cir. 1936); Palmer v. Financial Indem. Co., 215 Cal. App. 2d 419, 30 Cal. Rptr. 204 (1963); Roberie v. Southern Farm Bureau Cas. Ins. Co., 250 La. 105, 194 So. 2d 713 (1967); State Farm

Not knowing of the possibility of a settlement, the insured might be deprived of the opportunity to contribute toward the settlement and thereby protect himself.[48] However, merely neglecting to inform the insured of a settlement offer has been held insufficient to charge the insurer with liability.[49]

The attitude of the insured toward his own liability is also a significant factor in determining whether the company has properly discharged its obligation to the insured. Therefore, where the insured concurs in the rejection of a settlement offer[50] or strongly maintains that he was not at fault in the case, this will be considered by the courts in determining liability for refusal to settle.[51] Although it has been held that in order to complain about the company's failure to settle the insured must first urge the company to settle,[52] this requirement has been referred to recently as "artificial" and is now considered obsolete.[53]

Another factor which is taken into account by the courts, although perhaps unconsciously,[54] is the respective financial risks of the parties where settlement is refused.[55] For instance, courts are prone to hold the insurer liable if it is found gambling with a sizeable amount of the insured's money while trying to save a relatively small amount of its own.[56] But even where the insured has limited resources, the company still must consider his interest.[57]

Whether the injured party has made an offer to settle is also a factor to be considered. The mere fact that no offer has been received

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Mut. Auto. Ins. Co. v. White, 248 Md. 324, 236 A.2d 269 (1967); Radcliffe v. Franklin Nat'l Ins. Co., 208 Ore. 1, 298 P.2d 1002 (1956); Kunkel v. United Sec. Ins. Co. of N.J., 168 N.W.2d 723 (S.D. 1969).

[48] State Farm Mut. Ins. Co. v. White, *supra* note 47. *See also* Ging v. American Liab. Ins. Co., *supra* note 36.

[49] *See, e.g.*, Strode v. Commercial Cas. Ins. Co., 102 F. Supp. 240 (W.D. Ky. 1952), *aff'd*, 202 F.2d 599 (6th Cir. 1953); Norwood v. Travelers Ins. Co., *supra* note 44; Streat Coal Co. v. Frankfort Gen. Ins. Co., 237 N.Y. 60, 142 N.E. 352 (1923).

[50] *See, e.g.*, Royal Transit v. Central Sur. & Ins. Corp., *supra* note 40.

[51] *See, e.g.*, Younger v. Lumberman's Mut. Cas. Co., 174 So. 2d 672 (La. App. 1965); Peterson v. American Family Mut. Ins. Co., 280 Minn. 482, 160 N.W.2d 541 (1968).

[52] *See, e.g.*, New Orleans & C.R. v. Maryland Cas. Co., 114 La. 153, 38 So. 89 (1905).

[53] *See* 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4711, at 553 n.2.10. (1962). *See also* Southern Farm Bureau Cas. Ins. Co. v. Mitchell, 312 F.2d 485 (8th Cir. 1965).

[54] *See* Annot., 40 A.L.R.2d 168, 220 (1955).

[55] *See* Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1957).

[56] Annot., *supra* note 54.

[57] *See* Kinder v. Western Pioneer Ins. Co., 231 Cal. App. 2d 894, 42 Cal. Rptr. 394 (1965).

does not, as a matter of law, preclude a finding of liability for failure to settle.[58] This means that liability may result in certain cases if the insured fails to initiate negotiations.[59] From this theory it follows that it is not incumbent upon the insured to show that the case could have been settled within the policy limits for the insured to be held liable.[60] It has been held, however, that the failure of the insurer to solicit or make an offer does not necessarily render it liable to the insured in an excess suit.[61]

IV. Duty to Settle in Mississippi

The first case presented to the Mississippi Supreme Court which afforded an opportunity for discussion of the duty, *vel non*, of an insurer to settle was *Georgia Casualty Co. v. Cotton Mills Products Co.*[62] The case involved a policy with limits of $10,000. Suit was filed against the insured seeking damages in the sum of $25,000. Subsequently a judgment was entered for $12,500 on a verdict for the plaintiff, and the motion of defendant for new trial was denied. The plaintiff then offered to accept the sum of $9,000 in settlement of the judgment. Although the insured "strongly urged the acceptance of this settlement and proposed to contribute toward the payment of said compromise the sum of $500.00 and accrued court costs"[63] and the company's attorneys advised it to accept the settlement, the company decided that an appeal would be taken. The insurer's counsel had also indicated its belief that the verdict was excessive and that the supreme court would order a substantial reduction. The judgment was affirmed.

In deciding that the company was not liable for refusing to accept the compromise, the court said the contract[64] did not impose any responsibility on the company to settle the case, but rather gave the insurer an option to settle if it desired. Since there was no duty to settle, it was held, as a matter of law, that there could be no negligence.

The court intimated that there might be available a right of action for fraud or bad faith under proper circumstances:

> In this there is no hint of fraud. The lawsuit was conducted

[58] *See* State Auto. Ins. Co. v. Rowland, 221 Tenn. 421, 427 S.W.2d 30 (1968).

[59] *See* Fidelity & Cas. Co. v. Robb, 267 F.2d 473 (5th Cir. 1959).

[60] State Auto Ins. Co. v. Rowland, *supra* note 58.

[61] *See, e.g.*, General Cas. Co. v. Whipple, 328 F.2d 353 (7th Cir. 1964); Cotton States Mut. Ins. Co. v. Fields, 106 Ga. App. 740, 128 SE.2d 358 (1962); *cf.* Abernathy v. Utica Mut. Ins. Co., 373 F.2d 565 (4th Cir. 1967)

[62] 159 Miss. 396, 132 So. 73 (1931).

[63] *Id.* at 407, 132 So. at 75.

[64] The policy provision at issue was: "'The company (insurer) shall have the right to settle any claim or suit at its own cost at any time.'" *Id.* at 405, 132 So. at 76.

> in good faith; there was no arbitrary action on the part of the insurer in the performance of its contract; there was no coercion; there is no public policy of the state involved, and there is no statute affecting this situation.[65]

In a later case[66] the Mississippi Supreme Court affirmed the giving of a peremptory instruction to an insurer where an offer within the limits of a general liability policy was rejected prior to trial and a verdict in excess of the limits was returned against the insured. In holding that neither negligence nor fraud was shown by the evidence, the court did not go so far as to indicate an absence of a duty on the part of the insurer to prudently and diligently seek to protect the interests of the insured. Some of the factors considered by the court as determinative are found in the following excerpt from the opinion:

> In the absence of proof of a refusal to properly investigate the case, or conduct defense of it fairly, without willful oppression, or arbitrary action in refusing to settle the case [that] was so unreasonable as to constitute fraud, there can be no liability on the policy beyond the limits therein agreed to by the parties thereto.[67]

Elsewhere the court indicates that it also considered several other factors: (1) that the case litigated in behalf of the insured involved a close question of liability, (2) that the insurer had employed competent counsel to represent the insured, and (3) that the insured was represented individually by its own private counsel at all stages of the litigation.

The Fifth Circuit has held, *contra*, however, that a jury question was presented on the issue of bad faith in a suit for a declaratory judgment presented from Mississippi.[68] The pertinent factors considered by the court were (1) secret negotiations between the plaintiff and insurer's counsel, (2) assurance by the insurance agent that insured had nothing to worry about since he was covered by the policy, and (3) defense of the case on appeal under a nonwaiver agreement. Reversing the trial court's holding that there was no excess liability as a matter of law, the court hinted that the insured should have been advised of the negotiations and settlement possibilities and should not have been lulled into a "fancied security."

With the exception of *Georgia Life Insurance Co. v. Mississippi Central Railroad Co.*,[69] which is not applicable to our discussion in

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[65] *Id.* at 415, 132 So. at 77.

[66] Farmers Gin Co. v. St. Paul Mercury Indem. Co., 186 Miss. 747, 191 So. 415 (1939).

[67] *Id.* at 754, 191 So. at 417.

[68] Home Indem. Co. v. Williamson, 183 F.2d 572 (5th Cir. 1950).

[69] 116 Miss. 114, 76 So. 646 (1917).

view of its peculiar policy provision,[70] the Mississippi Supreme Court has not had before it any other case involving a question of excess liability for failure to settle within policy limits.

V. Conclusion

Since the Mississippi cases were decided, the law in most of the other states has evolved to a point where the interests of the insured are being given more recognition than the Mississippi cases would indicate. Current national criticism of insurance companies may also have had an effect on the development of the law.[71] The courts do not, however, ignore the fact that the insurer has worthwhile interests competing with those of the insured for recognition, as the various factors considered by the courts in determining liability indicate. In balancing these competing interests, the courts are recognizing the issue of liability as involving a test of the equitable discharge by the insurer under the circumstances of each case of the several obligations to the insured which arise out of the contractual relationship.

[70] The policy indicated that the insurer would be liable for an excess judgement up to a certain amount if it failed to accept an offer of compromise within the stated coverage limits. *Id.* at 116, 76 So. at 647.

[71] *See* Ridgeway, *No Risks Preferred*, The New Republic, vol. 160, Feb. 1969, at 18-21, where presumably limitless coverage is advocated for everyone under a government-run automobile insurance program.

FAIR LABOR STANDARDS COVERAGE FOR AGRICULTURAL EMPLOYEES

*William M. Champion**

I. Introduction

Since the adoption of the Fair Labor Standards Act[1] by Congress in 1938,[2] American labor in general has received the benefits of statutory minimum wages and overtime pay. These same benefits were, however, withheld *in toto* from agricultural workers[3] until 1966.[4] As the law currently stands some agricultural workers are entitled to minimum wage benefits,[5] but none may claim the overtime provisions of the Act.[6] Even where the agricultural worker is not excluded from the minimum wage law he comes under a special wage provision of $1.30 per hour,[7] as compared with the rate of $1.60 per hour paid to workers who were covered by the Act prior to the 1966 amendment.[8]

Before an agricultural laborer can be entitled to the minimum wage provided for by the Fair Labor Standards Act, he must either be an employee not excluded from the Act, or he must work for an employer not exempt therefrom, and he must qualify under the concept of either employee or enterprise coverage.

There is one exemption which relieves the agricultural employer of the requirements of the law, and four which exclude his employee from its coverage. The net effect of these two classes of exemptions or exclusions, from the worker's standpoint, is identical—as a matter of law, he is not entitled to the minimum wage.

II. Employer Exemption

The employer is exempt from compliance with the Act in any year if he did not use more than 500 man days of agricultural labor during any calendar quarter of the preceding calendar year.[9] A "man

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[1] 29 U.S.C. §§ 201-19 (1964).

[2] Act of June 25, 1938, ch. 676, §§ 1-19, 52 Stat. 1060.

[3] *Id.* § 13, at 1067.

[4] Act of Sept. 23, 1966, Pub. L. No. 89-601, 80 Stat. 830.

[5] 29 U.S.C. § 213 (a) (6) (Supp. IV, 1969).

[6] 29 U.S.C. § 213 (b) (12) (Supp. IV, 1969).

[7] 29 U.S.C. § 206 (a) (5) (Supp. IV, 1969).

[8] 29 U.S.C. § 206 (a) (1) (Supp. IV, 1969).

[9] 29 U.S.C. § 213 (a) (6) (A) (Supp. IV, 1969).

day" is defined as any day during which an employee performs agricultural labor for not less than one hour.[10] However, in computing the number of man days of labor used, the employer does not include the work performed by (1) any member of his immediate family, or (2) by a hand-harvest laborer paid on a piece-rate basis in an operation normally compensated on such basis, who commutes daily from his permanent residence to the farm, and who was employed in agriculture less than thirteen weeks during the preceding calendar year.[11] In regard to this second category of workers it should be noted that, because of the requirement that they commute daily from their *permanent* residence, the man days put in by migratory workers usually must be counted. Furthermore, for this work to escape being counted it must be hand-harvest labor. Thus, the operation of mechanical equipment, or the performance of non-harvest labor, even if it is performed by hand, must be included.

The Act provides for an exemption if the employer does not "use" more than 500 man days of agricultural labor in the appropriate calendar quarter.[12] The word "use" is not expressly defined so as to clarify whether it refers only to work performed by employees in the ordinary sense, or whether it refers to work performed by anyone other than the two groups specifically excluded from the calculation. This question is important because a large amount of agricultural labor is performed by independent contractors—usually involving the supplying and operating of mechanical equipment.

The term "man day" refers to agricultural work performed by an "employee,"[13] who in turn is merely one who is "employed."[14] While the word "employed" is not defined, the word "employ" is, and it means to suffer or permit to work.[15] It is tempting to conclude that "use" is nearly synonymous with "employ," and that it refers to work done by one who would be considered an employee as that term is ordinarily used. However, this may not be correct.

There are as yet no reported decisions defining man days, and the Administrator of the Wage and Hour Division has not, at this time, promulgated any interpretations of the 1966 amendments which would clarify this term.[16] On the other hand, a number of United

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[10] 29 U.S.C. § 203 (u) (Supp. IV, 1969).
[11] 29 U.S.C. § 203 (e) (Supp. IV, 1969).
[12] 29 U.S.C. § 213 (a) (6) (A) (Supp. IV, 1969).
[13] 29 U.S.C. § 203 (u) (Supp. IV, 1969).
[14] 29 U.S.C. § 203 (e) (Supp. IV, 1969).
[15] 29 U.S.C. § 203 (g) (1964).
[16] *See generally* CCH LAB. L. REP. ¶¶ 31,500-746 (WAGE & HOUR) [1966-1969 Transfer Binder].

States Supreme Court decisions dealing with the employment relationship in a non-agricultural setting have come to grips with the meaning of "to suffer or permit to work."

The Court has held that the question of whether one is an employee is to be answered in the light of economic realities rather than technical concepts of employment.[17] Thus, the time or mode of compensation is not decisive of the question insofar as application of the Fair Labor Standards Act is concerned.[18] On the other hand, one who works on the premises of another for his own advantage, but without an express or implied compensation agreement, is not covered.[19] The implication is clear that, while the Court will look through form to substance, nevertheless, the arrangement must create an employer-employee relationship rather than that of independent contractor-contractee. However, these are cases involving the question of whether certain employees were entitled to the minimum wage or overtime pay provisions of the Act. The question raised here is not one of coverage for these workers, but instead, whether they are "employees" in the sense that their work must be counted in deciding whether the employer loses his man days exemption so that other employees may be entitled to the minimum wage.

At first blush it seems ludicrous to think that work which is not of such a nature as to bring the one who performs it under the coverage of the Act may operate so as to contribute toward bringing others under this coverage. Yet the Act, by its express terms, creates such an anomaly. Four classes of agricultural workers are excluded from coverage,[20] but the work of only two of these classes is exempt from the man days calculation.[21] For example, cowboys and shepherds are not entitled to the minimum wage,[22] but their man days of employment are not excluded from the total man days computation.[23] Thus, it seems clear that the mere fact that an independent contractor is not included under the coverage of the Act may not exclude the labor he performs from being counted in the total man days computation. Since the determination of the employment status is not dependent upon the mode or time of compensation, but is made in light of the economic realities of the situation, it would seem that these independent

[17] Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28 (1961); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

[18] United States v. Rosenwasser, 323 U.S. 360 (1945).

[19] Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

[20] 29 U.S.C. § 213 (a) (6) (B)-(E) (Supp. IV, 1969).

[21] 29 U.S.C. § 203 (e) (Supp. IV, 1969). *See* text accompanying note 11 *supra*.

[22] 29 U.S.C. § 213 (a) (6) (E) (Supp. IV, 1969).

[23] *See* text accompanying note 11 *supra*.

contractors may be considered employees[24] for the purpose of this computation.

In a sense it seems strained to consider these groups to be employees of the farmer on whose land they may work. Yet one cannot overlook the fact that if they did not perform the work, it would be done by actual employees, if at all. Finally, it should be noted that the Act specifically excludes the work of two classes of employees from the man days computation.[25] Nowhere does it indicate whether the maxim that the inclusion of one is the exclusion of another should be applied under these sections. If it is not applied, additional questions immediately arise. These involve the issue of whether the labor of agricultural workers who are not specifically excluded from the Act, but who fail to qualify for coverage because they cannot meet the enterprise or employee coverage tests,[26] is to be included in the man days calculation.

Obviously, there is need for the Administrator of the Wage and Hour Division to direct his attention to these questions and promulgate interpretations of the law reflecting his best judgment on the subject. In reaching this judgment, he must consider the effect of the 500 man days requirement. It is to relieve small farmers of the requirement of paying the minimum wage. It is, therefore, more relevant to look to the amount of work being done than to view the question from the standpoint of the particular arrangement under which the work is carried out. In light of the extreme plight of the rural poor, and because the 1966 amendment to the Fair Labor Standards Act is remedial legislation, one is compelled to affirm the view that all agricultural labor performed on the farm and not expressly excluded from the man days calculation should be included.

III. Employee Exclusion

The result of the man days requirement is to exempt the employer who does not use more than the stated amount of agricultural labor. But, when the amount of labor employed exceeds this figure, the employees are not automatically covered. There are four specific

[24] Insofar as the independent contractor is concerned, the Senate Committee report states that the work performed by him or his employees would not be included in the man days calculation. However, the report then becomes vague by suggesting that the independent contractor might actually be an employee of the farmer and disposes of the matter by a reference to Rutherford Food Corp. v. McComb, *supra* note 17, and accompanying text. *See* S. Rep. No. 1487, 89th Cong., 2d Sess. 19 (1966); U.S.C.C. & A.N., 2, 89th Cong., 2d Sess., 3012 (1966).

[25] *See* text accompanying note 11 *supra*.

[26] 29 U.S.C. §§ 203(s), 206(a) (Supp. IV, 1969). *See* text accompanying notes 36-54 *infra*.

exclusions that may apply to any particular employee, and, even when not excluded, the employee must still qualify under the concept of either employee or enterprise coverage.

No agricultural employee who is the parent, spouse, child, or other member of his employer's immediate family is covered by the 1966 amendment.[27] While "other member" of the employer's immediate family is not defined, this apparently refers to his relatives, other than those enumerated, who live with the employer.[28] This exclusion applies to members of the immediate family of the employer, not the farm owner, where the two are not the same.[29] This has the effect of broadening, in regard to agricultural labor, the exclusion of the so-called "mom and pop" arrangements. Under these arrangements, in nonagricultural industries, enterprise coverage is denied where the only employees of the enterprise are the *owner* or members of his immediate family.[30] In addition, the special agricultural exclusion excludes totally, as distinguished from merely denying enterprise coverage to, members of the employer's immediate family.

The second group of agricultural employees excluded from the benefits of the Act are community pieceworkers. These are hand-harvest laborers who (1) are paid piece rates for their work (2) in an operation generally recognized as piece work in the region, (3) who daily commute from their permanent residence, and (4) whose employment in agriculture during the preceding calendar year was for less than thirteen weeks.[31]

Because of the requirement that the laborer, in order to be excluded, must commute daily from his permanent residence, migratory farm workers are not excluded from coverage under this provision. It should also be noted that this exclusion applies only to hand-harvest laborers. Therefore, the operator of mechanized harvesting equipment is not excluded, nor is the hand laborer when not working in the harvest.

In Mississippi the classic example of the type employee excluded by this provision is the cotton picker who commutes from his home in the city or town to work in the fields. He harvests the cotton by hand and is paid on the basis of the weight of the cotton he picks. That is, he is usually paid at the rate of "X" dollars per hundred pounds picked. Frequently his employment in agriculture is limited to picking

[27] 29 U.S.C. § 213 (a) (6) (B) (Supp. IV, 1969).

[28] CCH LAB. L. REP. ¶ 25, 242.40 (WAGE & HOUR).

[29] *Compare* 29 U.S.C. § 213 (a) (6) (B) (Supp. IV, 1969) *with* 29 U.S.C. § 203 (s) (Supp. IV, 1969). 1 CCH LAB. L. REP. ¶ 25, 242.40 (WAGE & HOUR).

[30] 29 U.S.C. § 203 (s) (Supp. IV, 1969).

[31] 29 U.S.C. § 213 (a) (6) (C) (Supp. IV, 1969).

cotton, which would seldom last for as long as thirteen weeks in any one year.

The next group excluded is the pieceworker under seventeen years of age. Hand-harvest laborers under age seventeen who (1) are paid piece-work rates, (2) in an operation generally recognized as piece-work in the region, (3) who are employed on the same farm as their parents, and (4) who are paid the same piece-work rate as is paid to older persons employed on the farm are excluded from coverage under the Act.[32]

This is somewhat different from the commuting pieceworker exclusion in that the requirements of commuting and having worked less than thirteen weeks in agriculture the preceding year have no application here. Instead, an age requirement of less than seventeen years and requirements that the employee work on the same farm as his parents and be paid the same as older piece workers are provided for in this exclusion. Apparently the group primarily affected by this section are the children of migrant workers.[33]

The final exclusion will have little effect in Mississippi. The Act provides that its benefits are not extended to employees principally engaged in range production of livestock.[34] This applies primarily to cowboys and shepherds; it was included because their services normally require constant attendance on a standby basis which makes computation of the hours they work extremely difficult.[35]

IV. Enterprise and Employee Coverage

Beyond the question of applicability of exceptions or exclusions lies the problem of enterprise or employee coverage. The Act requires that the minimum wage be paid to an employee who is himself engaged in commerce or in the production of goods for commerce, or to one who is employed by an enterprise engaged in commerce or in the production of goods for commerce.[36]

The rules for the determination of enterprise or employee coverage that are used in regard to other industries apparently apply also to agriculture.[37] Thus, an employee is covered if he is engaged in the production of goods for interstate or foreign commerce, or in the

[32] 29 U.S.C. § 213 (a) (6) (D) (Supp. IV, 1969).

[33] 1 CCH Lab. L. Rep. ¶ 25, 242.60 (Wage & Hour).

[34] 29 U.S.C. § 213 (a) (6) (E) (Supp. IV, 1969).

[35] S. Rep. No. 1487, 89th Cong., 2d Sess., 10 (1966).

[36] 29 U.S.C. § 206 (a) (Supp. IV, 1969).

[37] The 1966 Amendment did not affect the enterprise or employee coverage requirements in this regard. *See* note 4 *supra*.

production of goods for transportation in interstate or foreign commerce, including fringe activities. The amount of his effort directed toward commerce is not material, but these activities must be regular and recurring.[38] However, the employee must actually be engaged in commerce or the production of goods for commerce, and not in some activity that merely affects commerce.[39]

Most agricultural workers are probably not going to be considered to be "engaged in commerce." The decisions seem to be in accord in viewing this qualification as one that requires that the work be " . . . so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity."[40] The normal agricultural employments of tilling the soil, harvesting crops, and husbanding livestock do not bring the employee into the realm of instrumentalities or facilities of interstate commerce. Thus, it is unlikely that many agricultural employees will be found to be "engaged in commerce."

On the other hand many of these employees are quite probably going to be "engaged in the production of goods for commerce." Under modern processes of marketing food and fiber, large quantites of these agricultural products cross state boundaries daily. Where food is produced for a purely local market, as is sometimes true with vegetables, eggs and some other commodities, an entire crop may be produced, sold and consumed without entering the channels of interstate commerce. However, most employers whose operation is large enough to deny them the 500 man days exemption will be producing for interstate commerce.

The fact that livestock or a crop is produced and sold locally by the farmer and thereafter enters the channels of interstate commerce should have no effect on the laborer's coverage under the Act. Although no decisions construing the 1966 amendment have yet been reported, a fairly close analogy can be drawn to several mining cases. In small mining and quarrying operations the mineral will be removed from the earth and sold locally before entering into channels of commerce. Nevertheless the miners are covered as employees engaged in the production of goods for commerce.

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[38] *See, e.g.*, Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946).

[39] *See, e.g.*, McLeod v. Threlkeld, 319 U.S. 491 (1943).

[40] Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, 429 (1955) (holding that employees performing construction work on locks in an interstate navigational canal—an artery of interstate commerce—were "engaged in commerce" under the act). *Compare* McLeod v. Threlkeld, *supra* note 39, at 497 (holding that employees of an independent contractor who supplied meals to maintenance crews working on railroad rights of way—arteries of interstate commerce—were not "engaged in commerce" under the act).

In *Thomas v. Hempt Bros.*[41] the Court was faced with a situation in which employees quarried stone which was used in cement mixtures by their employer, who then delivered the cement to his customers. These customers used the cement in the construction of interstate highways and airports and in the maintenance of interstate railway roadbeds. The Court held that the employees of the quarry were engaged in the production of goods for commerce even though the mining, processing of cement, delivery to customers, and use by the customers all took place within the State of Pennsylvania.[42]

Subsequently, the Seventh Circuit Court of Appeals, relying in part on *Thomas*, reached the same result as to the employees of a quarrying operation which sold the sand, gravel and stone mined by these employees to manufacturers of concrete products. The manufacturers, in turn, sold their products to purchasers who used it in the repair of interstate highways and roads.[43] Again all operations and transactions, from the mining process to ultimate use of the manufactured product, were carried out wholly within the confines of a single state—Wisconsin. In its opinion that court expressly rejected the trial court's finding that the mining activities were too far removed from the point at which the materials entered interstate commerce as ingredients of the manufactured concrete products for finding that the employees working the quarry were engaged in the production of goods for commerce.[44]

The Fifth Circuit Court of Appeals, in a case in which the owners of tobacco auctions and warehouses contended that their employees were not covered by the Act because they handled the tobacco after it was produced and before it entered commerce, observed:

> This argument ignores the fact that the marketing process is as integral a stage in the interstate movement of the goods as other stages concededly within the coverage of the Act. The auctioning of the tobacco is an indispensable step in the overall process. Moreover, there is no basis for believing that commerce does not begin until a point after production of the goods is completed. 'Commerce' is a broad term. It overlaps stages of production. It encompasses preliminary steps necessary in the preparation of goods for sale in commerce. . . . When production ends, commerce has already begun; there is no interval in between the two in which a function so important as marketing can be performed outside the reach of the statute.[45]

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[41] 345 U.S. 19 (1953).

[42] *Id.* at 20; *see also* Alstate Construction Co. v. Durkin, 345 U.S. 13 (1953).

[43] Wirtz v. Crystal Lake Crushed Stone Co., 327 F.2d 455 (7th Cir. 1964).

[44] *Id.* at 458.

[45] Mitchell v. Pidcock, 299 F.2d 281, 283 (5th Cir. 1962).

It is difficult to believe that the growing and harvesting of the tobacco would be considered any less integral a stage than would its marketing. Furthermore, since commerce begins before production ends, it seems clear that farm laborers who grow or harvest agricultural crops, or who tend livestock, are engaged in the production of goods for commerce. Their engagement in this manner is no less sufficient because the initial sale of the product takes place before it enters interstate commerce.

The worker also should be entitled to coverage when he produces a crop, such as cotton, which may be sold to the United States Government in a purely intrastate arrangement, stored, and not sold again. In *Walling v. Haile Gold Mines, Inc.*,[46] the Fourth Circuit Court of Appeals held that where a company engaged in gold mining had but one customer, the United States Government, its employees were nonetheless engaged in the production of goods for commerce as contemplated by the Fair Labor Standards Act. The court refused to accept the theory that, since there was no competition in a monopsonistic market, a product sold in such a market could not affect commerce and, therefore, that the Act had no application.[47] The opinion, construing precedent,[48] concluded that " . . . the [c]ongressional power of exclusion from interstate commerce does not depend on either the 'commercial' nature of the article or the existence of competition" but is plenary, subject only to specific prohibitions of the Constitution.[49]

It should be pointed out that in the *Haile Gold Mines* case the court was, to some extent, impressed with the fact that the gold first entered into interstate commerce in South Carolina, but the sale was not completed until the gold was received and accepted by the United States Mint in Pennsylvania.[50] It would seem strange, however, to hold that the Act applies where the product must be shipped across state lines before the government purchases it but does not apply where the government purchases it prior to its crossing the state line. This is particularly true in a monopsony because the purchaser can generally arrange to have the sale finalized whenever and wherever he finds it most convenient. Furthermore, as has been seen, a finding that goods were produced for commerce is not depending upon a showing of either competition among producers or that the production affects commerce. To hold that the agricultural worker who produces a commodity marketed in the type of arrangement described in this paragraph

[46] Walling v. Haile Gold Mines, Inc., 136 F.2d 102 (4th Cir. 1943).
[47] *Id.* at 104.
[48] *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).
[49] Walling v. Haile Gold Mines, Inc., *supra* note 46, at 104.
[50] *Id.* at 103.

is not engaged in the production of goods for commerce would be a victory of form over substance.

Even if the individual agricultural employee does not have the necessary engagement in commerce or in the production of goods for commerce, he may be entitled to the minimum wage if he is employed by an enterprise so engaged.[51] Enterprise coverage embraces two features. An enterprise engaged in commerce or in the production of goods for commerce is one which has employees engaged in commerce or in the production of goods for commerce and which, during the period of February 1, 1967, through January 31, 1969, had an annual gross volume of sales of not less than $500,000; or which, after January 31, 1969, has an annual gross volume of sales of not less than $250,000.[52] It is inconceivable that any farm doing a half million, or a quarter million, dollars worth of business per year and using more than 500 man days of agricultural labor in a calendar quarter will not have at least two employees engaged in commerce or in the production of goods for commerce.

It should be noted that the definition of enterprise coverage refers to employees engaged in commerce or in the production of goods for commerce not merely to employees so engaged who are not elsewhere excluded from the benefits of the Act. Again, as in the case of the man-days exemption,[53] it appears that an individual employee may be excluded from coverage by the Act; yet his labor can contribute to bringing others within its provisions. Although unlikely, this situation could theoretically result in the specific exclusion of every employee who is actually engaged in commerce or the production of goods for commerce from the Act, while coverage is afforded every employee not so engaged.

A final observation about enterprise coverage is in order. Under the concept of employee coverage it is the activity of the employee, and not of the enterprise, that determines coverage.[54] On the other hand, under enterprise coverage it is of no moment what the individual employee does, so long as the tests concerning the dollar volume of business and the employees engaged in commerce or the production of goods for commerce are met.

V. Wages

As was pointed out earlier,[55] when an agricultural employee

[51] 29 U.S.C. § 206 (a) (5) (Supp. IV, 1969).
[52] 29 U.S.C. § 203 (s) (1) (Supp. IV, 1969).
[53] *See* text accompanying notes 20-21 *supra*.
[54] *See, e.g.*, Overstreet v. North Shore Corp., 318 U.S. 125, 132 (1943).
[55] *See* text accompanying notes 6-8 *supra*.

qualifies for the minimum wage, he is entitled to a wage of $1.30 per hour with no overtime pay. However, the term "wage" includes the reasonable cost to the employer of furnishing the employee with board and lodging if these are normally furnished by such employer.[56] Because the furnishing of lodging for farm employees is the rule in Mississippi and throughout the Southeast, this provision is of particular importance.

It must be noted that the sum charged off as "wages" includes only the reasonable *cost* to the employer of furnishing lodging. Therefore, he is not entitled to a profit on the use of the house,[57] nor is he necessarily entitled to the fair rental value of the building.[58] The reasonable cost of providing this lodging is a reasonable allowance (not to exceed five and one-half per cent) for interest on the employer's depreciated capital investment in the lodgings, plus annual costs of operation and maintenance.[59] The costs of operation and maintenance presumably include depreciation, taxes, insurance, and non-capital repairs or improvements.[60]

VI. Child Labor

The Act provides that no producer, manufacturer or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment employing oppressive child labor.[61] However, this does not apply to children employed in agriculture outside school hours unless the child is under age sixteen, employed in an occupation the Secretary of Labor finds to be particularly hazardous, and is not employed by his parent or someone standing in *loco parentis* to him.[62]

This is roughly a redefinition of the term "oppressive child labor" which, as it appears elsewhere in the statute, generally means the employment of children below age sixteen in any occupation.[63] Under the special treatment given agricultural employment the child labor is not "oppressive" even when the child is under age sixteen unless it is performed during school hours or is performed in an occupation found to be particularly hazardous.

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[56] 29 U.S.C. § 203 (m) (Supp. IV, 1969).

[57] 29 C.F.R. § 531.3 (b) (1969).

[58] *See* 29 C.F.R. § 531.3 (c) (1969).

[59] *Id.*

[60] *See In Re* Determination of Reasonable Cost of Furnishing Housing and Other Facilities to Employees of Joseph Roy Flowers, Decision of the Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dept. of Labor. July 18, 1968. CCH Lab. L. Rep. ¶ 30,818 (Wage & Hour) [1966-1969 Transfer Binder].

[61] 29 U.S.C. § 212 (a) (1964).

[62] 29 U.S.C. § 213 (c) (Supp. IV, 1969).

[63] 29 U.S.C. § 203 (*l*) (1964).

"School hours" refers to hours maintained in the school district where the child lives while he is employed;[64] thus, it does not admit exceptions for the individual child who may be excused from school on a particular day.[65] On the other hand, if a child has finished high school, he has no school hours and does not fall under this provision.[66] A problem can arise if a child is employed in a school district other than the one in which he normally attends school, and the two districts do not have the same terms. The Secretary has indicated that the child may be employed if the school he normally attends has closed for the summer even though the school in the district where he works is still in session. This is not true if his school is closed for other reasons.[67]

Regardless of school hours, it is unlawful to employ a child under age sixteen in an agricultural occupation declared hazardous by the Secretary. At this time the Secretary has so characterized sixteen occupations involving (1) the handling of certain pesticides, herbicides, fungicides, and fertilizers or the equipment used in applying them; (2) handling explosives; (3) serving as flagman for aerial applicators; (4) operating or working around certain motorized equipment or machines activated by such equipment; (5) working with certain timber; (6) working at heights over twenty feet; (7) working in gas-tight enclosures; or (8) working around particular stud animals.[68]

The Secretary has provided that children under age sixteen may be employed in some of these hazardous occupations involving machinery provided they are properly instructed in its use by their employer, are properly supervised in their work, are fourteen years of age or older, and have completed prescribed 4-H Club training programs that relate to the operation of this machinery.[69] More specifically, the exceptions permit operating or working on tractors; self-unloading wagons and trailers; earth hauling, moving, or digging machines; combines, balers, and harvesters; and roughage blowers and auger conveyors.[70]

It is interesting to note that qualification for these exceptions is primarily dependent upon the child's training and background. Nowhere is there a requirement that the employer or supervisor must demonstrate any understanding of the operation of the involved equip-

[64] 29 U.S.C. § 213 (c) (1) (Supp. IV, 1969).

[65] C.F.R. § 1500.123 (b) (1969).

[66] *Id.*

[67] *Id.* It is concluded that the Secretary has "indicated" this result because the regulation states that as a reasonable precaution, one should not employ a child under such circumstances before May 15. The use of a caveat by an administrator should always cause the administered to proceed with caution.

[68] 29 C.F.R. § 1500.71 (b) (1969).

[69] 29 C.F.R. § 1500.70 (1969).

[70] *Id.*

ment or of proper safety procedures in relation to such equipment. Furthermore, the Secretary does not set any standards for the condition of the machinery being operated. In other words, the Secretary of Labor attaches more importance to a 4-H Club training program than to the state of repair of a piece of farm machinery that a child operates. This attitude hardly guarantees an improved farm safety record.

VII. Concluding Remarks

The main purpose of this paper has been to show the extent to which the Fair Labor Standards Act affords—or fails to afford—benefits to the farm laborer. For this reason it has been largely descriptive. However, even such an article need not be devoid of opinion.

The minimum wage law seems to offer little to farm workers. Many of them will not qualify for its benefits. Others will qualify, but none get overtime. Those who get the minimum wage will receive only $1.30 per hour. It is unlikely that anyone reading this article, including law students, works for $1.30 per hour.

Child labor provisions are interesting in that they prohibit the employment of children in a variety of occupations. Then the Secretary pulls an about face and allows the employment of children practically anywhere on the farm provided they have completed a 4-H Club training course and stay away from stud horses.

The most striking feature of the application of this Act to agricultural laborers is the manner in which it appears to grant them benefits, but then it manages to withdraw these benefits from most of the workers. A lawyer (or anyone else) may be forgiven for wondering about a Congress and an administration that will battle discrimination based on race or sex, but who will indulge in discrimination based on the occupation of an individual.

STUDENT COMMENTS

AGRICULTURAL LAW: APPEALING AGRICULTURAL ALLOTMENTS

I. Introduction

The cotton farmer, who is discontented with the size of his acreage allotment and who desires to appeal, faces what appears to be—at first glance and perhaps even after careful analysis—an uphill fight against a whole range of administrative units.

Congress, burdened with many pressing problems during the Depression years, placed into the hands of the President and hence into the hands of the Secretary of Agriculture a skeleton of delegated power. As with most governmental agencies, it was the function of the administrative head to put meat onto this skeleton by interpreting the Congressional grant of power and by promulgating additional rules and regulations. These rules and regulations, together with the initial grant of power by Congress to the Secretary of Agriculture, have created a system in which agents of the Department determine at every stage of allocation how much acreage an individual farmer will receive. In addition, agents investigate deviations from these determinations, prosecute such deviations, and make an initial and often final adjudication of any disputes arising within the allocative system. The attorney who seeks to aid the farmer needs to be acquainted with the administrative and judicial procedures—locally, statewide, and nationally—for handling acreage appeals. In Mississippi there is a particularly pressing need to be knowledgable with respect to cotton. While seeking to indicate the administrative and judicial appeal methods, an attempt will be made to characterize the administrative units so as to develop a certain "feel" for those principles which will produce the greatest effect upon the bodies hearing such acreage appeals.

II. The Agriculture Allotment System

It would be helpful and perhaps necessary before attempting to pursue the above goal, however, to explain briefly the administrative framework responsible for establishing the quotas and allotments, the appeals of which are the subject of this paper. The Agricultural Adjustment Act of 1938[1] provides the methods for establishing the marketing quotas for all crops, including cotton.[2] Within this Act, Congress clearly expressed its legislative intent and purpose for establishing a marketing quota for cotton, stating:

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[1] 7 U.S.C. §§ 1281 *et seq.* (1964).

[2] 7 U.S.C. §§ 1341-50 (1964).

> The provisions of this part affording a cooperative plan to cotton producers are necessary and appropriate to prevent the burdens on interstate and foreign commerce caused by the marketing in such commerce of excessive supplies, and to promote, foster, and maintain an orderly flow of an adequate supply of cotton in such commerce.[3]

To this end Congress provided that:

> Whenever during any calendar year the Secretary determines that the total supply of cotton for the marketing year beginning in such calendar year will exceed the normal supply for such marketing year, the Secretary shall proclaim such fact and a national marketing quota shall be in effect for the crop of cotton produced in the next calendar year.[4]

The Secretary is guided by certain standards contained within the statute. Approval of the quota by a referendum of farmers engaged in cotton production is necessary before the marketing quota becomes established.[5] It is interesting to note that a two-thirds vote of approval is required before the quota becomes effective.[6] That farmers overwhelmingly support the system is amply shown by the fact that annually since its enactment in 1938, the quota has been disapproved only rarely.[7]

The marketing quota having been approved, the next step for the Secretary is to establish a national acreage allotment for the crop.[8] The Secretary will then apportion the acreage "to the States on the basis of acreage planted to cotton . . . during the five calendar years immediately preceding the calendar year in which the national marketing quota is proclaimed. . . ."[9] Provision is also made for the Secretary to withhold a three hundred and ten thousand acre reserve.[10]

When the states have received their allotments, State Committees apportion it to the counties, retaining as a reserve generally ten percent of the total.[11] The Act tells us that this reserve is to be used for trends, abnormal conditions affecting plantings, small or new farms, the correction of inequities, and the prevention of hardships.[12]

After the county has received its allotment, a County Committee, which is composed of locally elected farmers, distributes it among the

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[3] 7 U.S.C. § 1341 (1964).
[4] 7 U.S.C. § 1342 (1964).
[5] 7 U.S.C. § 1343 (1964).
[6] *Id.*
[7] The referendum has been passed generally with the exception of the war years.
[8] 7 U.S.C. § 1344 (a) (1964).
[9] 7 U.S.C. § 1344 (b) (1964).
[10] *Id.*
[11] 7 U.S.C. § 1344 (e) (1964).
[12] *Id.*

farmers.[13] The county may retain fifteen percent to be used for the same exigencies as the state reserve, but with attention being given to such additional considerations as "land, labor, and equipment available for the production of cotton, crop-rotation practices, and the soil and other physical facilities affecting the production of cotton. . . ."[14] Finally, there are three schemes, one of which is initially adopted by the Secretary, which the County Committee may use for alloting the acreage to the individual. These are based upon either (1) all tillable acreage with the exclusion of certain crops,[15] (2) the average acreage planted to cotton during the past three years,[16] or (3) the acreage allotment for the previous one year.[17]

The only other administrative unit provided for within the Act is the local Review Committee. The function of this unit is basically to review the actions of the County Committee, and the Review Committee's three members are, like those of the County Committee, local residents.

This then, in the briefest fashion, is the Congressional scheme for the administration of the cotton program. Possible dissatisfaction, on the part of the farmer, with any number of aspects of this scheme is apparent. For example, the farmer may feel that the Secretary did not follow the statutory scheme in setting up the national marketing quota; or, the State Committee improperly utilized the reserve so as to discriminate against his county and thus ultimately against him; or, his County Committee failed to grant him a sufficiently large allotment. These are just a few of the myriad of complaints the farmer may have and from which he might desire relief against the national, state, or local administrators of the program. How is he to procede against each?

III. Appealing County Committee Determinations

A. *Failure to File Within Time Limit*

The largest number of appeals, and the only ones for which there is a congressionally established procedure, are those which relate to some determination by the County Committee.[18] The Act provides that any farmer who is dissatisfied with his farm marketing quota may appeal within fifteen days from the date he receives notice of his farm

[13] 7 U.S.C. § 1344 (f) (1964).
[14] 7 U.S.C. § 1344 (f) (3) (1964).
[15] 7 U.S.C. § 1344 (f) (2) (1964).
[16] 7 U.S.C. § 1344 (f) (6) (1964).
[17] 7 U.S.C. § 1344 (f) (8) (1964).
[18] The statutory administrative procedures for review of determinations are found in 7 U.S.C. §§ 1361-68 (1964).

acreage allotment.[19] Care should be taken to insure that an appeal be filed within the time limit. In regulations promulgated by the Department the fifteen day requirement is imposed;[20] the statute itself provides: "Unless application for review is made within such period, the original determination of the farm marketing quota shall be final."[21] The case law is in complete accord with this regulation. In an action to obtain the refund of a penalty paid by the plaintiff, a tobacco farmer, to the county A.S.C. office, the Federal District Court concluded that:

> Section 1363, which provides that any farmer who is dissatisfied with his farm marketing quota may have this quota reviewed by a local review committee if he asks for such review within fifteen days of his notice of allotment, as provided by Section 1362. If he does not ask for review within this period the original determination of the quota becomes final.[22]

One should, however, not suppose that this fifteen day limitation has never been excused. In an action to challenge the determination of a Review Committee that a wheat farmer was precluded from appealing since he had not timely filed, the Federal District Court, after pointing to the plaintiff's absence from the state because of the illness of a relative, indicated:

> [T]here is a necessity of giving courts and administrative bodies some discretion in granting extension of time for appearance where the failure to appear within the prescribed time is clearly excusable. I feel this principle is applicable here, and that the Review Committee should determine whether plaintiff's failure to file his application within the prescribed period was unavoidable or clearly excusable. If so, the committee should afford him a hearing on his application.[23]

B. *Jurisdiction and Questions Considered by Review Committees*

Supposing that the complainant has made a timely application for review, a natural inquiry is directed to those matters which fall within the purview or jurisdiction of the Review Committee. The regulations provide that certain factors may be subject to review. These include:

> [A]ny of the following factors which enter into the establishment of such quota: farm acreage allotment, farm normal yield or projected farm yield as applicable, actual production for the farm, farm marketing excess, acreage of the commodity

[19] 7 U.S.C. § 1363 (1964).
[20] 7 C.F.R. § 711.13 (1969).
[21] 7 U.S.C. § 1363 (1964).
[22] Paul v. United States, 222 F. Supp. 102, 103 (E.D.N.C. 1963).
[23] Howell v. Shannon, 170 F. Supp. 139, 142-43 (D. Mont. 1959).

> on the farm, determination by the county committee of the land constituting the farm . . . .[24]

The case law also defines the jurisdiction of the County Review Committee, which is to review only county, not state, ASCS determinations. In one of the more important cases in the interpretation of the role of the Review Committee, the Fifth Circuit Court of Appeals dealt with "another skirmish in the smoldering controversy between West Texas cotton farmers . . . and those of East Texas . . . ."[25] The court noted that:

> [I]n this complex scheme both County Committee and Review Committee have much importance. . . . [T]he legislative pattern shows that the function of the County Committee is fairly to distribute that which has been allocated to that county. But since the standards to be followed are invariably general, and many are so flexible that they would open up avenues for discrimination whether intentional, inadvertent, corrupt, or accidental, there was need for another agency, the County Review Committee, having local roots and hence local responsibility for the review of such actions. The system assures not only initial determination, but a complete review anew of the whole matter by neighbors who must live with their decisions. . . . Congress meant to establish an initial and a reviewing agency of *local* people having *local* responsibility for decisions concerning *local* factors having a definitive *local* impact.[26]

The vast majority of cases hold to the proposition that the County Review Committee is limited to considerations of determinations by the County Committee. The one case which might be interpreted as allowing the County Review Committee to review a determination of a State Committee may be explained on its very peculiar factual situation. The plaintiff in this case asserted that since the County Committee merely served as a "rubber stamp" for the improperly acting State ASCS Administrator, the exclusive review mechanism was inapplicable, i.e., the Review Committee could only review actions by the County Committee and this was the action of the State Administrator. The Fifth Circuit, in distinguishing *Fulford*, stated that:

> The questions presented here are not comparable in scope and impact to those in *Fulford v. Forman* . . . in which action of the state ASCS officials relating to the statewide policy of apportioning acreage allotments among various sections of the state was drawn into question. Instead, the present controversy relates to action which affects only the marketing quotas and acreage allotments of certain individual farmers. As such, it is

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[24] 7 C.F.R. § 711.13 (1969) refers one to 7 C.F.R. § 711.2(d) (1969).

[25] Fulford v. Forman, 245 F.2d 145, 146 (5th Cir. 1957).

[26] *Id.* at 151.

> a matter properly to be considered by the County Committee and reviewed by the Review Committee.[27]

The Fifth Circuit pointed out that even if the County Committee's action has been "induced, influenced, or instigated" by state ASCS officials, if the County Committee has acted, its actions are reviewable.[28] The rationale of *Fulford v. Forman*[29] is applicable, the court reasoned, only if a statewide policy formulation has been rendered by the State Committee.[30]

That the County Committee must act before the Review Committee can function was further amplified in *McDougald v. Local Review Committee*.[31] Here the plaintiff requested a peanut allotment, and the County Committee simply took no action. The plaintiff then applied for a hearing before the Review Committee, which alloted the plaintiff five acres. The Review Committee subsequently revoked the allotment on the grounds that it lacked authority to consider the application until the County Committee had made a determination. The plaintiff appealed this latter determination by the Review Committee. The court declared that "the determination of a quota by the County Committee is absolutely essential for exercise of the Review Committee's jurisdiction under the authority granted by Congress."[32] The court also noted that the remedy for a County Committee which refuses to act is "an order in the nature of a writ of mandamus."[33]

The real function of the Review Committee and of ultimate court review is to insure that the County Committee will not be guilty of "discrimination whether intentional, inadvertent, corrupt, or accidental."[34] The Review Committee, as has already been noted, is to consider only those factors which could have entered into a decision by the County Committee. This position was enacted as a regulation by the Secretary:

> In all cases, the review committee shall consider only such matters as, under applicable provisions of the act and regulations of the Secretary, are required or permitted to be considered by the county committee in the establishment of the quota sought to be reviewed.[35]

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[27] Chandler v. David, 350 F.2d 669, 677 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1965).

[28] *Id.*

[29] Fulford v. Forman, *supra* note 25.

[30] Chandler v. David, *supra* note 27.

[31] 149 F. Supp. 405 (E.D.N.C. 1965).

[32] *Id.* at 408.

[33] *Id.*

[34] Fulford v. Forman, *supra* note 26.

[35] 7 C.F.R. § 711.12 (1969).

The courts have upheld this regulation.[36]

With this principle clearly in mind, one can, with some sense of success, determine what the Review Committee will or will not consider. The Review Committee will, for example, consider the availability of additional land, since this is a matter which can be considered by the County Committee.[37] The Review Committee has no authority, however, to make a constitutional determination, since this is not within the purview of the County Committee.[38] The Review Committee must look at the facts upon which the plaintiff bases his constitutional claim and then see if the statute or regulations afford relief without resort to constitutional principles.[39]

Thus, the farmer's best hope when appearing before the Review Committee is to show that the County Committee did not act in harmony with a statute or regulation. As is observable from the cases, where a determination of the County Committee has been overruled, it was usually rejected because such determination was not in harmony with the regulations or the Act.[40] It should be pointed out, however, that even those determinations which may appear defective because of some irregularity of the County Committee, such as undue influence, may be cured if the Review Committee makes a *de novo* determination, utilizing the same factors the County Committee is permitted to use, minus, of course, those factors which constituted undue influence.[41]

C. *Protective Discretion and the Burden of Proof*

Before deciding to attempt an appeal from a County Committee, the farmer should be aware that the courts have granted to the County Committee a degree of protective discretion. Observe, for example, in an action to obtain additional cotton acreage, the court has indicated that:

> [A]t the outset we are reminded that the county committee, which is composed of laymen, must act under a law that is far from simple in its terms. The regulations are as technical, if not more technical, in detail than the Act.[42]

The Court further pointed out that a number of possibilities are

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[36] Fulford v. Forman, *supra* note 25, at n.6.

[37] Edwards v. Owens, 137 F. Supp. 63 (E.D. Mo. 1955).

[38] Simpson v. Laprade, 248 F. Supp. 399 (W.D. Va. 1965).

[39] *Id.*

[40] Review Committee, Venue II v. Reynolds, 391 F.2d 430 (5th Cir. 1968); Gladney v. Review Committee, 230 F. Supp. 35 (W.D. La. 1964), *aff'd*, 354 F.2d 990 (5th Cir. 1966).

[41] Kephart v. Wilson, 219 F. Supp. 801 (W.D. Tex. 1963).

[42] Edwards v. Owens, *supra* note 37, at 65-66.

given to the County Committee for the utilization of the reserve, but the County Committee has been granted the power to determine which of the classes will be recognized.[43] The degree to which the findings of the County Committee will be supported is observable from the statement that "[T]he findings of the county committee leave much to be desired. But we take note that we are dealing with documents prepared by laymen trying to follow a law and regulations written by highly trained lawyers."[44]

In support of the proposition which implies a certain favoritism for the County Committee, it should be noted that in all those cases in which the courts have spoken on the burden of proof, the obligation rests clearly on the plaintiff farmer. In *Owens*[45] the court spoke in terms of a "burden of demonstrating that the findings of the county committee have no basis in the law or regulations which are valid under the law."[46] More succinctly put, "[I]n a proceeding before the Review Committee, the burden of proof is on the respondent [plaintiff] as to all issues of fact raised by him."[47]

That the courts may be shifting the burden of proof somewhat has become apparent only recently. After noting the holding of *Lee v. DeBerry*, the district court in *Loutares v. Smith*[48] stated that:

> [A]ssuming that statement to be applicable in this case, the Court is of the opinion that a burden rests upon the County Committee prior to the time the appellant therefrom bears the burden before the Review Committee. The County Committee has the burden, or perhaps the obligation, to place before the Review Committee those facts upon which its ruling was founded. This obligation to present, if you please, a *prima facie* showing that its ruling was based upon some set of facts must be met prior to the time the burden of proof before the Review Committee is assumed by the appellant. . . .
>
> The essential element of this obligation is that the County Committee inform the appellant and the Review Committee of those facts upon which its ruling is based. Until such time as the County Committee fulfills this function, the burden of proof does not rest upon the appellant.[49]

In conclusion, the usual measure of proof mentioned is, as with

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[43] *Id.* at 66-67.

[44] *Id.* at 66.

[45] Edwards v. Owens, *supra* note 37.

[46] *Id.* at 66.

[47] Lee v. DeBerry, 65 S.E.2d 775, 780 (S.C. 1951).

[48] 285 F. Supp. 578 (E.D.N.C. 1968).

[49] *Id.* at 583.

most civil cases, a preponderance of the evidence,[50] although some cases speak in terms of a heavy burden of proof.[51]

D. *Local Determinations: Finality v. Rehearing*

A moderate amount of confusion exists concerning the finality of a determination by the County Committee and the Review Committee. Regulations have been promulgated which allow the Review Committee's hearings to be reopened within fifteen days on the motion of the Review Committee; within fifteen days upon the written request of the applicant, the County Committee or another interested party, such written request showing new evidence; or within fifteen days upon written notice by the Secretary.[52] Confusion exists, however, because of a judicial remark that:

> [T]he administrative agency, as well as the farmer, is prohibited from re-opening proceedings unless an appeal has been filed timely under §1363 or there is an allegation of fraud or misrepresentation permitting the invocation of 7 C.F.R. §719.11 (f) (6) . . . .[53]

The problem is the reference to § 1363 not 7 C.F.R. § 719.11 (f) (6), which permits a reopening in the rather unusual situation where there has been misrepresentation by an owner who is displaced by an agency having the right of eminent domain. Section 1363 does not deal with reopening proceedings, but the remarks by the court imply that if a § 1363 appeal, i.e., an appeal to the Review Committee from a determination of the County Committee, is filed, the right to reopen a Review Committee hearing is automatically obtained. This is clearly not in harmony with the above cited regulations. The discord between whether the appeal must be filed within fifteen days or whether filing under § 1363 allows an automatic rehearing may be made to harmonize, however, by realizing that the court is probably not establishing a basis for reopening, but rather is stating a condition precedent which must be met before the regulations for reopening can be employed.

The difficult area was further confused by the remarks of the district court in *Lindsey Brothers v. Jones*.[54] Here the Secretary of Agriculture attempted to alter a cotton allotment and compliance determination which had been issued by personnel of the ASCS office and which had become final as to the producer, who had substantially complied with

[50] Hawkins v. State Agriculture Stabilization and Conversation Comm., 149 F. Supp. 681 (S.D. Tex. 1957), *aff'd*, 252 F.2d 570 (5th Cir. 1958).

[51] Fulford v. Forman, 144 F. Supp. 536 (N.D. Tex. 1956), *aff'd*, 245 F.2d 145 (5th Cir. 1957).

[52] 7 C.F.R. § 711.25 (1969).

[53] Gladney v. Review Comm., 257 F. Supp. 57, 61 (W.D. La. 1966).

[54] Lindsey Bros. v. Jones, 271 F. Supp. 933 (E.D. Ark. 1967).

the program. In this case the determination of compliance had been made on September 4, and the County Committee determination that the farmer was not in compliance had been made on October 31, after compliance had been attempted and the farmer had actually started to harvest. The district court felt that once the farmer had started and had substantially complied with any directives of the ASCS office, changes could not then be made. Otherwise, the farmers would be subject to a "unilateral" program. The court went on to say that the "A.S.C. County Committee cannot retroactively revise allotments without a grant of such powers by Congress."[55]

The implication of *Lindsey Brothers v. Jones*[56] is that appeals and requests by any party for the reopening of proceedings—be they of the County Committee or the Review Committee—must be made within the regulatory period, especially if the farmer has already complied with the determinations of the administrative unit. Apparently a hearing after the fifteen day limit would be impossible. Any doubts concerning the time limit, however, were largely cleared up by the Eighth Circuit Court of Appeals, which reversed the case and remanded it to the district court.[57] The appeals court pointed out that a determination of compliance and the farmer's actual compliance in no way produced finality. The farmer was not protected, since even if a penalty were assessed against him for overplanting after it had been determined that he was in compliance, he had a right to appeal the penalty, and the compliance determination is only one fact to be considered in refuting the penalty.[58] Finality came only when "the county committee notifie[d] the producer that it ha[d] assessed a penalty."[59]

The Eighth Circuit, in distinguishing *United States v. Kopf*,[60] pointed out that finality of a determination was related both to the individuals making such determination and to the nature of the determination. The court in *Jones* declared:

> In *Kopf*, the yield determination was made by the ASCS committee after a full evidentiary hearing. Here, it was made by the personnel of a county ASCS office without a hearing. We also note that the administrative action was of an executive, rather than an adjudicative, nature and was thus not binding in a *res judicata* sense.[61]

In summarizing this section one should note that:

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[55] *Id.* at 938.

[56] Lindsey Bros. v. Jones, *supra* note 54.

[57] Jones v. Hughes, 400 F.2d 585 (8th Cir. 1968).

[58] *Id.* at 589.

[59] *Id.*

[60] 379 F.2d 8 (8th Cir. 1967).

[61] Jones v. Hughes, *supra* note 57, at 589-90.

(1) Regulations and case law provide for reopening a County Committee or a Review Committee proceeding if:

(a) the initial condition precedent step of timely appealing to the Review Committee is complied with, and

(b) after such compliance, the regulations of the Department are followed.

(2) A determination, even though erroneous, may be considered binding on all parties, if:

(a) it was rendered after a full evidentiary hearing, and not by office personnel, and,

(b) the farmer had, in good faith, substantially relied upon and complied with the determination.

E. *Court Review*

1. Exhaustion of Administrative Remedies

If the farmer is convinced that the Review Committee has acted as capriciously as the County Committee, he may institute proceedings for court review of the determination of the Review Committee.[62] The farmer cannot, however, bypass the Review Committee and initially commence a judicial proceeding. The courts generally have been clear in demanding that a farmer must exhaust his administrative remedies before he can have access to the courts.[63] This appears to be especially true with non-constitutional matters. There is some question, however, on whether the failure to seek administrative review will extinguish a constitutional right. In *Miller v. United States*[64] the Sixth Circuit stated:

> It is unnecessary to cite the countless decisions with reference to the rule of exhaustion of administrative remedies and its application to the finality of determination. The doctrine applies to a remedy provided by regulation as well as by statute. . . . The District Court and this court are deprived of jurisdiction by defendant's failure to seek review. . . .
>
> Moreover, defendant's inaction precludes him from raising his constitutional questions, for these questions clearly bear upon the 'legal validity' of the determinations. 7 U.S.C. 1367. . . .[65]

The Third Circuit, however, declared in a case involving a plaintiff, who had not exhausted his administrative remedies by appealing to the local Review Committee, that it did not think that:

Congress, by stipulating in the Act for the review of a farm

[62] The provisions for Court review are 7 U.S.C. §§ 1365-66 (1964).

[63] Weir v. United States, 310 F.2d 149 (8th Cir. 1962).

[64] 242 F.2d 392, 395 (6th Cir. 1957), *cert. denied*, 355 U.S. 833 (1957).

[65] *Id.* at 395.

> marketing quota by a review committee, can prevent an aggrieved farmer from raising the question of the Act's constitutionality for the first time in the district court as a defense to an action for penalties under the Act. For the question of the constitutionality of the Act is quite a different question from whether the farmer's quota is proper and it is a question with which a committee set up under the Act is not competent to deal . . . .[66]

Even the rule that the plaintiff must exhaust his administrative remedies, especially for non-constitutional complaints, is not without exceptions. In one case, involving a plaintiff who informed the local ASCS officials that she desired to appeal a decision, the local Committee erroneously informed her that her appeal should be to the State Committee. The plaintiff, therefore, failed to seek recovery from the local Review Committee on the advice of the local Committee. The court pointed out that:

> [D]efendants, having induced plaintiff to pursue the wrong course, cannot now successfully assert that this court is without jurisdiction to entertain the action because plaintiff has not exhausted her administrative remedies.[67]

A final, unanswered question in the area of exhaustion of administrative remedies concerns which administrative remedies must be exhausted. The Act only mentions the necessity of going to the Review Committee before one can seek the benefits of a court determination. The problem is that other administrative remedies exist and can be found within the regulations. When a court states that all administrative remedies must be exhausted, are they including these other regulatory administrative remedies as well?

Two such sets of alternate administrative remedies are found within the *Code of Federal Regulations.* One is primarily concerned with enlarging the provisions found within the Act.[68] No really new administrative remedies are found within the regulations. Another administrative procedure, however, permits a whole galaxy of new administrative remedies.[69] This alternative procedure allows the participant or producer who is dissatisfied with "any determination initially made by the county committee or office" to have such determination examined by the state and local authorities and even by the Deputy Administrator.[70]

Would all the above administrative remedies have to be exhausted? A personal observation produces a response in the negative. It is a well-

[66] United States v. Kissinger, 250 F.2d 940, 941-42 (3d Cir. 1957).
[67] Hart v. Hassell, 250 F. Supp. 893, 896 (E.D.N.C. 1966).
[68] 7 C.F.R. § 711 (1969).
[69] 7 C.F.R. § 780 (1969).
[70] 7 C.F.R. § 780.3 (1970).

established principle in the area of administrative law that when regulations and statutes differ, one must look to the statute as controlling.[71] It would appear for this reason that the plaintiff need only appeal to the Review Committee before invoking the authority of the courts.

2. Choice of Forum and Removal

The statute allows the plaintiff to institute his action "in the United States district court, or . . . in any court of record of the state having general jurisdiction, sitting in the county or the district in which his farm is located. . . ."[72] As was pointed out by the United States Court of Appeals for the Tenth Circuit, however, "[a]lthough the statute gives the farmer . . . a choice of forum, it does not guarantee that his choice shall remain undisturbed."[73] In this instance, the appellant had initially commenced an action in a state court of limited jurisdiction. The appellate court, after noting that the statute granted concurrent jurisdiction to the federal and to the state courts, noted that "where original jurisdiction exists in the federal courts removal is allowed by 28 U.S.C. 1441 (a) unless specifically prohibited by an act of Congress."[74] It should be observed, however, that although removal was in fact permissible, "the federal court has only such jurisdiction as was possessed by the state court from which the action was removed."[75] Since the plaintiff began his action in a state court of limited jurisdiction while the statute required a court of general jurisdiction, the state court had no jurisdiction and consequently the federal court received none and was required to dismiss the case.[76]

3. The Role of the Courts: Fact v. Law

Whether the plaintiff enters into a state or a federal court, he should be aware that the determination of the administrative bodies will usually be favorably supported.

The courts have consistently taken the position that:

> [T]he specialized agency charged with the duty of implementing the statutory program is entrusted by Congress with power to issue and apply regulations necessary to make that program effective. A reviewing court should not substitute its views for those of the agency, unless the interpretation and application of the regulation in and to a particular case is so unreasonable,

[71] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 24 (1st ed. 1959).
[72] 7 U.S.C. § 1365 (1964).
[73] Beckmon v. Graves, 360 F.2d 148, 149 (10th Cir. 1966).
[74] *Id.* at 149.
[75] *Id.* at 150.
[76] *Id.*

> arbitrary or capricious that the court must conclude that the administrative action was unlawful.[77]

Other cases speak in terms of giving the administrative determinations controlling weight unless plainly erroneous[78] or of not overruling the Review Committee if there is substantial evidence to support the Committee's conclusions.[79] The usual judicial observation has been that:

> The committees possess varying ambits of power under the Agricultural programs for the different commodities, and abuse of their discretion or a misuse of their powers is of course correctable by the courts . . . .[80]

In what ways may the courts, cognizant of this need to support administrative determinations, operate? The most common qualification placed upon the courts as a result of interpretations of the statute,[81] and one which may be anticipated from the previous observations, is that the courts must not overturn the fact findings of the Review Committee. The judiciary is limited to questions of law. In an action to review the determinations of a Review Committee it has been pointed out that:

> This case is not a commonplace one in which the Court is clothed with its ordinary jurisdiction, legal or equitable. It is a special statutory proceeding in which jurisdiction extends only to review the action of the review committee, and the Court is limited in its scope of inquiry to questions of law and is bound by the findings of fact of the review committee if there is any competent evidence to support such findings. 7 U.S.C. § 1366.[82]

So strong is the inhibition against courts making determinations of fact that, if a court determines that the committee has arbitrarily not followed the law, the court must remand the case to the County Committee for new determinations of fact. A court cannot make these factual determinations itself.[83] It should be noted that the Act provides that if, after a court proceeding has been instituted, an application is made to adduce new evidence, this additional evidence is to be "taken before the review committee . . . ."[84] The court will then make a determination based upon the original record and the supplementary

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[77] Mills v. Toppert, 185 F. Supp. 160, 164 (S.D. Ill. 1960).

[78] Dighton v. Coffman, 179 F. Supp. 682 (E.D. Ill. 1959).

[79] Lindsey Bros. v. Jones, *supra* note 54.

[80] Rakestraw v. Winchester, 254 F. Supp. 729, 734 (M.D.N.C. 1966).

[81] 7 U.S.C. § 1366 (1964) provides that "[t]he review by the court shall be limited to questions of law . . . ."

[82] Graham v. Lawrimore, 185 F. Supp. 761, 764 (E.D.S.C. 1960).

[83] Review Comm., Venue II v. Reynolds, 391 F.2d 430 (5th Cir. 1968).

[84] 7 U.S.C. § 1366 (1964).

record.[85] If the Review Committee's determinations were made in accordance with the law, the court shall affirm them;[86] if the law has not been complied with:

> [The court must] remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires.[87]

4. Mootness v. Establishment of Histories

The nature of the allotment system prevents either party to the litigation from declaring that a moot question is involved. In an action in which the Review Committee was appealing the action of a federal district court which had overruled the Review Committee's refusal to interfere with a determination by the County Committee, the question of mootness was presented. The court disposed of this problem in one short paragraph:

> The question of mootness perhaps should initially be mentioned inasmuch as the plantings of the 1959 crop year in Nebraska have already been made. We feel that the case is not moot. This is because of the existence of possible penalties and because of the use of 1959 as one of the base period years in connection with the 1960 wheat crop.[88]

Thus, it would appear that the question of mootness could not bar a suit until the importance of the year in assessing penalties and in establishing a history no longer exists.

Not only is the administrative unit prevented from contending that once the crop has been planted and harvested it is not subject to review, but the farmer is also prevented from using such a defense. In *Gladney v. Review Committee*,[89] the plaintiff erroneously had received a large allotment for a number of years, and he contended that the "1964, 1965, and 1966 allotments were final and must stand and that they must serve as the basis for his 1967 allotment."[90] The court of appeals disposed of this contention declaring:

> Gladney [the plaintiff] has received a windfall for three years by enjoying the benefits of an allotment ultimately found to be erroneous. The District Court was correct in finding that Gladney may not continue to capitalize on the initial error and

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[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] Review Comm., Venue VII v. Willey, 275 F.2d 264, 271 (8th Cir. 1960).

[89] 380 F.2d 929 (5th Cir. 1967).

[90] *Id.* at 932.

> that it should be left to the Committee to decide . . . how much of the reserve acreage should be allotted to him . . . .[91]

5. Appellate Review

The farmer can, of course, appeal a decision of the district court. Most of the principles which are applicable to the district court are also applicable to the appeals court. Not unexpectedly, it has been pointed out that the circuit court cannot "substitute its own factual determination for that of the County and Review Commitees."[92] In *Gladney* the plaintiff contended that by virtue of § 1366, if the appeals court found an error of law, it was obligated to remand the case.[93] The bench pointedly rejected this and held that "the power of the Court of Appeals to *modify* a judgment of the District Court lawfully before it without reversing or remanding the case is well established."[94]

Perhaps the most direct remark concerning the power of the appellate court was made by the Eighth Circuit. In an action which had originally been brought by cotton farmers in the district court to review a decision by the Review Committee, the Eighth Circuit disposed of any doubt concerning the power of the circuit courts with the simple statement that the "power of this Court [Circuit Court of Appeals] is coextensive with that of the District Court." (citation omitted).[95]

IV. Appealing Determinations of the State Committee

A. *Court Review*

Much rarer than an appeal of a County Committee determination is an appeal of a determination of the State Committee. Very often the farmer may feel he has been injured because the State Committee acted unfairly with respect to his county, i.e., his allotment was less than it might have been, not because of any action by the County Committee, but because of an arbitrary State Committee determination. What can the farmer do to protect such a determination?

Formerly, the chances of a successful appeal against the State Committee were marginal at best. As has previously been pointed out, the farmer can not seek relief against the State Committee through the local Review Committee.[96] Even more far reaching limitations, however,

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[91] *Id.* at 933.

[92] Gladney v. Review Comm., *supra* note 53, at 62.

[93] *Id.* at 62.

[94] *Id.* at 62-63.

[95] Jones v. Hughes, supra note 57, at 590.

[96] Fulford v. Forman, *supra* note 25.

were placed on suits against the State Committee in the case of *Hawkins v. State Agriculture Stabilization and Conservation Committee*.[97] Here several farmers were protesting the actions of the State Committee in distributing the state reserve. Various individuals, including the plaintiff, had appeared before the State Committee while it was considering how to allocate the state reserve. The plaintiffs sought an injunction and a declaratory judgment in the district court against the State Committee to prevent the reserve allocation from being made in the manner proposed when the State Committee establishes a system for allocating the reserve.

The court came to a number of conclusions:

> 1. Determination of the amount and allocation of the State reserve is committed by law to the discretion of the State Committee, subject to final approval or disapproval in the Secretary. *The Court has no authority to substitute its judgment* on these matters for that of the Committee and Secretary and *may not decree, fix and allocate the State reserve* or order the Committee and Secretary to fix and allocate it in a particular amount and in a specified manner. (citation omitted).
>
> 2. The determination and allocation of the State reserve is a rule-making function. The investigations and deliberations of the Committee and Secretary, on the basis of which this function is exercised, do not require formal hearings or a formal record. (emphasis added).[98]

In affirming on the basis that the State Committee had been within its congressionally granted power and discretion, the Fifth Circuit declared that there was a question which was not going to be decided, concerning whether "Congress has precluded a judicial review of acreage apportionment among counties."[99]

The above case was preceded by *Fulford v. Forman*[100] in which the circuit court had also avoided the issue of seeking relief against the State Committee. After observing that the Review Committee could not overrule the State Committee, the circuit court declared:

> This does not mean that the cotton farmers are necessarily without the means of judicial review for those acts by the State Committee, the Secretary, or his other agencies, deemed to be not in accordance with law. What those rights are, or where, or how they may be asserted is not before us.[101]

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[97] Hawkins v. State Agriculture Stabilization and Conservation Comm., *supra* note 50.

[98] *Id.* at 687.

[99] Hawkins v. State Agriculture Stabilization and Conservation Comm., 252 F.2d 570, 571 (5th Cir. 1958).

[100] Fulford v. Forman, *supra* note 25.

[101] *Id.* at 153.

The court did, however, by way of a footnote, offer a suggestion on a means of getting a State Committee before the courts "without . . . holding that any such remedy is or is not open, or the conditions under which it might be available or used, and reserving all such questions for unfettered future decision . . . ."[102] The avenue suggested by the court is utilization of the provisions of the Administrative Procedure Act.[103] The *Fulford* court pointed out that unless the Agricultural Adjustment Act of 1938 indicated "a purpose to preclude all judicial review or commit all to the unreviewable discretion of the Administrator . . ." then the Administrative Procedure Act may be utilized.[104] The Procedure Act provides that in the absence of "any applicable form of legal action . . . agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."[105] The actions reviewable include any "preliminary, procedural, or intermediate agency action or ruling not directly reviewable . . . ."[106]

One might also suppose that the Administrative Procedures Act is made applicable by the general applicability section of the Procedure Act.[107] This section states that the Procedure Act applies unless statutes preclude judicial review or unless agency action is granted by law to the discretion of the agency. Neither of these two qualifications are present in the Agricultural Adjustment Act so as to preclude the application of the Procedure Act.

In subsequent cases, the Administrative Procedure Act has apparently been embraced by the courts. In *Morrow v. Clayton*,[108] an action was brought under the Administrative Procedure Act, and the question of whether courts have jurisdiction over the members of the State Agricultural Stabilization and Conservation Committee and its Executive Director was presented. The Tenth Circuit, after pointing out that the Review Committee had no jurisdiction over the State Committee under the *Fulford* rule,[109] declared that:

> A careful examination of the provisions of the [Agricultural Adjustment] Act reveals that Congress never intended for the Review Committee to have jurisdiction to review the administrative actions of the State Committee, the Administrator, the Secretary or their duly authorized agents at a level above the

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[102] *Id.* at 153 n.23.
[103] 5 U.S.C. §§ 701 *et seq.* (Supp. IV, 1968).
[104] Fulford v. Forman, *supra* note 25, at 153 n.23.
[105] 5 U.S.C. § 703 (Supp. IV, 1968).
[106] 5 U.S.C. § 704 (Supp. IV, 1968).
[107] 7 U.S.C. § 701 (Supp. IV, 1968).
[108] 326 F.2d 36 (10th Cir. 1963).
[109] *Id.* at 43.

> county committee. It follows that the appellees have no administrative remedy and they cannot be required to exhaust something which they do not have.[110]

In a later case the Secretary attacked the use of the Administrative Procedure Act on the ground that:

> [J]udicial review, and thus jurisdiction, is precluded under the provision of that section which excepts agency action from judicial review where a statute precludes judicial review, or where agency action is by law committed to agency discretion. § 1009 (a).[111]

The Fifth Circuit Court of Appeals disagreed by stating that the statute must clearly indicate an intention on the part of Congress to preclude judicial review.[112] Title 7 U.S.C. §§ 1363-66 does permit review by the local Review Committee, which is limited to County Committee determinations. The court of appeals, however, concluded that "there is no basis in the Agricultural Adjustment Act for attributing such an intention [to preclude a judicial challenge to a state committee determination] to Congress . . . ."[113] The Fifth Circuit further rejected the contention that the Administrative Procedure Act was unavailable because "the action of the Secretary was by law committed to his discretion."[114] The Secretary is not unfettered, declared the judges, but is required to operate within the statute.[115]

A final path which the farmer might employ as a means of obtaining entry into the federal courts was recently suggested. In *Drew v. Lawrimore*,[116] the plaintiff was not only suing the County Committee by virtue of §§ 1365 and 1366, but he was also suing the Secretary and the State Committee under three statutory sections which apparently had not been used previously.[117] These were 7 U.S.C. § 1376,[118]

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[110] *Id.*

[111] Freeman v. Brown, 342 F.2d 205, 212 (5th Cir. 1965).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Drew v. Lawrimore, 257 F. Supp. 659 (D.S.C. 1966).

[117] *Id.* at 662.

[118] Court jurisdiction; duties of United States attorneys; remedies and penalties as additional. The several district courts of the United States are vested with jurisdiction specifically to enforce the provisions of this subchapter. If and when the Secretary shall so request, it shall be the duty of the several United States attorneys in their respective districts, under the direction of the Attorney General, to institute proceedings to collect the penalties provided in this subchapter. The remedies and penalties provided for herein shall be in addition to, and not exclusive of, any of the remedies or penalties under existing law. 7 U.S.C. § 1376 (1964).

28 U.S.C. § 2201,[119] and § 1361.[120] The district court accepted this as a basis of jurisdiction without even considering it worthy of comment. It perhaps should be noted, however, that the Fourth Circuit, in reversing the district court on other grounds, pointed out that the district court had the power to issue a writ of mandamus but declared:

> We noted in Sleeth v. Dairy Prods. Co., 228 F.2d 165, at 167-168 (4th Cir. 1955), that the rule is well established that "courts will not issue a mandamus or other order to control the action of an executive or administrative officer in the discharge of statutory duties involving the exercise of judgment or discretion, unless the attempted performance of the duty amounts to an abuse of discretion.[121]

B. *Administrative Review*

Possibly because of the doubt left in some of the cases as to whether the State Committee could be brought into court or perhaps because there were no administrative provisions for reviewing a State Committee determination, regulations were promulgated so as to allow administrative review of State Committee determinations. It is now provided that:

> Any producer or participant who is dissatisfied with any determination initially made by . . . [the] State Committee . . . may obtain a reconsideration of such determination and an informal hearing in connection therewith by filing a request for reconsideration with the county committee. If the initial determination was made by the State committee . . . the county committee shall forward the request for reconsideration to the authority initially making the determination.[122]

It would, therefore, appear that there exists an administrative route which may be followed. It may be that this administrative reconsideration must be sought before the previously mentioned judicial review of a State Committee determination can be sought. The exhaustion of administrative remedies has never been specifically required before allowing judicial review of state committee determinations, since no

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[119] Creation of remedy. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. 28 U.S.C. § 2201 (1964).

[120] Action to compel an officer of the United States to perform his duty. The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. 28 U.S.C. § 1361 (1964).

[121] Drew v. Lawrimore, 380 F.2d 479, 483 (5th Cir. 1967).

[122] 7 C.F.R. § 780.3 (1969).

remedy existed prior to 1964.[123] The implication of those cases which held that the Administrative Procedure Act could be employed since there were no administrative remedies[124] would appear to be that the administrative remedies must be exhausted before a judicial review of a State Committee determination is possible.

V. Appealing Determinations of the Secretary of Agriculture

The fewest number of appeals are lodged against the Secretary of Agriculture. If the farmer is injured by an action of the Secretary, however, he should not feel that the Secretary is immune from suit.

The methods of gaining jurisdiction against the State Committee are also applicable for use against the Secretary. In *Morrow v. Clayton*[125] and *Drew v. Lawrimore*[126] both the Secretary and the State Committee were being sued. In *Freeman v. Brown*[127] the Secretary of Agriculture was the only defendant involved in the litigation. Jurisdiction was granted in these cases.

Besides the methods mentioned above, there is an additional route that the distraught farmer may follow. The General Venue Section of the United States Code provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or any agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.[128]

Section 1391 goes on to say that the summons and complaint to the officer or agency "may be made by certified mail beyond the territorial limits of the district in which the action is brought."[129]

This section clearly grants venue to the district courts. Personal jurisdiction is granted, of course, by the mere fact that service is permitted and provided for. Subject matter jurisdiction is obtained since the dispute will be arising under a federal statutory scheme, the Agricultural Adjustment Act, or because a Constitutional question may be

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[123] 7 C.F.R. § 780.3 first appeared in 29 F.R. 8200 (June 30, 1964).

[124] Morrow v. Clayton, 326 F.2d 36 (10th Cir. 1963).

[125] *Id.*

[126] Drew v. Lawrimore, *supra* note 116.

[127] Freeman v. Brown, *supra* note 111.

[128] 28 U.S.C. § 1391 (e) (1964).

[129] *Id.*

involved. Section 1331 may be employed, since the federal district court "shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."[130]

Of course, the problem with using § 1331 is the $10,000 justiciable amount. Another route may be employed to gain subject matter jurisdiction which does not involve any required amount. This, of course, is § 1337 which provides that "[T]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."[131] The United States Supreme Court held that a suit under the provisions of the Agricultural Adjustment Act of 1938, "[T]hough no diversity of citizenship is alleged, nor is any amount in controversy asserted so as to confer jurisdiction . . . the case falls within subsection (8)[132] which confers jurisdiction upon District Courts "of all suits and proceedings arising under any law regulating commerce."[133]

VI. Summary

Thus, the farmer will note that both judicial and administrative procedures exist which permit a review of a determination by the County and the Review Committee. Judicial review of the Secretary is also possible, but there is no administrative review since he has an unspoken immunity as head of the agency.

One should observe that an appeal is an uphill fight and that the appeal procedures are designed to insure a sense of fair play and due process. The farmer may well succeed if any administrative link in the entire chain has acted capriciously or arbitrarily. If, however, the administrative units have merely exercised the discretion entrusted to them, then an appeal seems doomed to failure.

C. Michael Malski

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[130] 28 U.S.C. § 1331 (1964).
[131] 28 U.S.C. § 1337 (1964).
[132] 28 U.S.C. § 1337 (1964) previously appeared under 28 U.S.C. § 41 (8) (1940).
[133] Mulford v. Smith, 307 U.S. 38, 46 (1939).

PROPERTY: THE FIXED LAW OF CHANGING BOUNDARIES

I. Introduction

Throughout history meandering rivers have been used as boundaries between nations, states and individual tracts of real estate within these entities. Any tract of land which is bordered by such a river has continually changed in size and shape through the years. Basically, there are three ways in which such changes occur. Either land is torn from the bank by the river, land is added to the bank by the deposit of particles from the river, or the boundary is materially changed by the river's altering its course.

Because of the increase in litigation concerning such changes, this comment will consider the unique body of law which has developed to cope with the title problems arising when land is bordered by a meandering river. Special attention is focused upon the Mississippi River, with emphasis upon disputes between Mississippi, Arkansas, and Louisiana landowners.

II. Accretion

Most commonly, land boundaries are changed by the river through erosion and accretion. As the river currents tear away parts of the bank in one place, they in turn deposit particles of this material in various places downstream.[1] The new land formed by these deposits may go beyond the boundary for which the grantee of the land paid at the time of his purchase. The question then arises: who has title to this new land? The law is well settled that any increase to the land which is so gradual that it cannot be perceived at any one moment of time inures to the benefit of the owner of the land to which it is annexed.[2] It is most important to determine how long it took the land to build up, and, although it is not necessary for the land to build up over a great number of years, the change cannot be sudden.[3] If the addition was slow and gradual, it does not matter whether it was caused by natural or artificial means.[4] In either case, where the increase is slow and gradual, title will be vested in the owner of the land to which the particles attach.[5]

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[1] Jeffries v. East Omaha Land Co., 134 U.S. 178 (1890); Gill v. Hedgecock, 207 Ark. 1079, 184 S.W.2d 262 (1944); Sharp v. Learned, 195 Miss. 201, 14 So. 2d 218 (1943).

[2] *See* cases cited note 1 *supra.*

[3] Gill v. Hedgecock, *supra* note 1; McClure v. Couch, 182 Tenn. 563, 188 S.W.2d 550 (1945).

[4] State v. Gill, 259 Ala. 332, 66 So. 2d 141 (1953); Brundage v. Knox, 279 Ill. 450, 117 N.E. 123 (1917). An exception to this general rule occurs in the case in which the landowner causes, by artificial means, the accretion to his land. Saunders v. New York Cent. & H.R.R., 144 N.Y. 75, 38 N.E. 992 (1894).

[5] *See* cases cited note 4 *supra.*

It is interesting to note that the same rules of accretion have been applied in two different types of cases—those in which the build up was slow and others in which the build up was rapid. To understand how this situation developed it is necessary to observe the judicial history of the American accretion principle, which may have found its origin in the French or Roman civil law rather than in the English common law.

The early Roman jurists took an approach to the resolution of title problems created by a meandering river which was very similar to the present American approach.[6] Within accounts of Roman Law is found the following fact situation and legal solution[7] to a title problem: A had a farm fronting on a public road; B possessed a narrow strip of land on the other side of the public road from A which was bordered by a stream; C owned a farm on the opposite side of the stream from B. The river slowly moved across B's strip of land and then continued in this direction until it had taken in the public road. The river then slowly receded until it had returned to its former bed.[8] The Romans resolved the title problem in the following manner: as the river moved across B's land and the public road, B's land became the property of C. As the river returned across the public road and the area which had originally been B's land to its original bed, it took the land it had given to C and gave it to A.[9] (The public road did not pass as an accretion to anyone.)

The legal solution to this ancient problem is basically the same in America[10] as it was almost 2000 years ago under the civil code of Rome. There is reason to believe that the civil law approach was introduced to America through the French Code Napoleon.[11] During the formative years of American law, there was such sympathy with France for its aid in the American revolution and hatred for England that French law was readily accepted while English law was held in such disfavor that some states refused to cite common law authorities. New Jersey and Kentucky even passed laws against the citation of English authorities.[12] This mood soon changed,[13] but through the effective use[14] of the French Civil Code

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[6] Glassie, *Restoration of the Former Front Estate by Alluvion*, 10 VA. L. REV. 106 (1923).

[7] *Id.* at 106-07.

[8] *Id.* at 107.

[9] *Id.*

[10] 56 AM. JUR. *Waters* § 477 (1956).

[11] Wiel, *Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law*, 6 CALIF. L. REV. 245 (1918).

[12] Pound, *The Influence of French Law in America*, 3 ILL. L. REV. 354, 357-58 (1909).

[13] *Id.* at 362-63.

[14] *Id.* at 360.

by such prominent jurists as Chancellor Kent and Justice Story, French law has left a lasting impression on American law.[15] In *Kent's Commentaries*, Chancellor Kent cites the French and Roman Civil Codes as authority for the accretion principle that small gains made to the banks of a stream running between two separate landowners go to the benefit of the owner, to the bank to which the land attaches.[16]

The common law accretion rules which are the same as the civil law rules[17] seem to have been introduced into America by *Blackstone's Commentaries* which was cited in many of the early American cases on the subject.[18] Blackstone's phrase, *de minimis non curat lex*[19] (the law will not take notice of trifling matters), was often used as a justification for holding that the riparian landowner should have title to the accretion to his land.[20] The application of this justification was perfectly logical in England and along the eastern seaboard of the United States where the rivers are relatively small and the addition of land is gradual.[21]

When title disputes occurred along the Missouri and Mississippi Rivers the *de minimis* justification was totally inapplicable, because the powerful currents of these rivers caused rapid changes in a short period of time.[22] *County of St. Clair v. Lovingston*[23] involves an illustrative situation in which the alluvial deposits from the Mississippi River caused three 100 acre lots to increase to twice their size in less than 60 years.[24] *East Omaha Land Co. v. Jeffries*[25] reports an even greater and more rapid increase along the Missouri River. In the *Jeffries* case a 37 acre tract increased by an additional 40 acres in less than 20 years time.[26] Increases such as these could hardly be considered "trifling matters."

It is only academic to worry about the origin of the accretion theory since both the common law and the civil law use the same approach,[27] and this approach has been generally followed in the United States.[28] It

[15] *Id.* at 355. *See* also Wiel, *supra* note 11, at 253.

[16] 3 KENT, COMMENTARIES *428.

[17] *Id.*

[18] Warren v. Chambers, 25 Ark. 120 (1867); Adams v. Frothingham, 3 Mass. 352 (1807).

[19] 2 BLACKSTONE, COMMENTARIES *262.

[20] *See* cases cited note 18 *supra.*

[21] Adams v. Frothingham, *supra* note 18; Attorney-General v. Chambers, 45 Eng. Rep. 22 (Ch. 1859).

[22] Jeffries v. East Omaha Land Co., *supra* note 1; County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874); Sharp v. Learned, *supra* note 1.

[23] 90 U.S. (23 Wall.) 46 (1874).

[24] *Id.*

[25] 40 F. 386 (C.C.D. Neb. 1889).

[26] *Id.*

[27] 3 KENT, COMMENTARIES *428 n. (*c*).

[28] 56 AM. JUR. *Waters* § 477 (1956).

is interesting to note that the American courts have not always applied the ancient accretion rule. When the unusual case[29] arose in which preserving the landowner's riparian right of access to a major body of water was in conflict with applying the accretion rule to a meandering stream, one court held that the right of access to water was not to be denied, and therefore refused to use the accretion principle.[30]

Besides *de minimis non curat lex* and preservation of the right of access to the water, there have been several other phrases cited by the American courts as justification for applying the accretion rule. Among the more common phrases are the following: all land should have an owner;[31] accretion is compensation for loss by erosion;[32] and accretion to land is the same as an increase of animals or fruit of trees.[33] The cases do not indicate the origin of these phrases, which may have been created by the various courts as they felt the need for such an aid. Generally, one or more of these phrases are given in the American cases[34] as justification for applying the same principle as was used centuries ago by the Romans.

III. Thalweg

An absolute limit to the rule of accretion is that it cannot extend across a state line.[35] This limitation causes disputes between riparian landowners who live on opposite sides of a river forming an interstate boundary if each state allows its riparian owners to claim title to the state line.[36] The dispute concerns not who owns the land in a particular state, but in which state the land is situated.[37] Normally, this would pose no problem since boundaries between states are usually fixed imagi-

[29] Normally the accretion principle would assure the landowner that he would continue to have access to the water. *See* 56 Am. Jur. *Waters* § 478 (1956).

[30] Waring v. Stinchcomb, 141 Md. 569, 119 A. 336 (1922). The facts and decision of this case are as follow: A and B had tracts of land fronting on the Chesapeake Bay which were separated by a small stream running into the Bay. Due to the formation of a sandbar on B's side of the stream, the stream was shifted over A's land so that by accretion to B's land the bar finally extended across the front of A's property. The court held that while the new land which formed in front of A's property would ordinarily be an accretion to B's land, it refused to apply the accretion principle, because to do so would be to deny A his riparian right of access to the Chesapeake Bay.

[31] Jeffries v. East Omaha Land Co., *supra* note 1; Banks v. Ogden, 69 U.S. (2 Wall.) 57 (1864).

[32] Shively v. Bowlby, 152 U.S. 1 (1893); New Orleans v. United States, 35 U.S. (10 Pet.) 292 (1836).

[33] Bowes v. Chicago, 3 Ill. App. 2d 15, 120 N.E.2d 15 (1954); Brundage v. Knox, *supra* note 4.

[34] *See, e.g.*, Waring v. Stinchcomb, *supra* note 30, 119 A. at 340.

[35] St. Louis v. Rutz, 138 U.S. 226, 250 (1891).

[36] *Id.* at 249-50.

[37] *Id.*

nary lines which never change. But when a navigable river such as the Mississippi is the boundary, the opposite is true. The boundary along the Mississippi River is the ever changing thalweg or sailing channel of the river.[38]

The thalweg doctrine was originally applied to controversies between sovereign nations which had a navigable river as a common boundary.[39] When an applicable dispute arose between states separated by the Mississippi River, the Court readily applied this principle of international law.[40] In a leading case[41] the following quotation from a treatise[42] on international law was stated with approval:

> Where a navigable river forms the boundary of conterminous states, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two states, the presumption of law being that the right of navigation is common to both . . . .[43]

The thalweg principle was logically applied to states to assure each state bordering on a navigable river that no state would be able to exclude the other from using the river for navigation.[44] While the thalweg rule often causes the state line to be crooked, it protects the most important right of navigation and has been applied to the southern boundary between Mississippi and Louisiana on out into the Mississippi Sound as well as to the better defined course of the Mississippi River to the north.[45]

IV. Avulsion

The rule of accretion and the rule of the thalweg are decribed above in terms of imperceptible changes at one point in time. If, however, from either a natural or artificial cause, a stream *suddenly* leaves its old bed and forms a new one, this sudden and rapid change is termed an avulsion.[46] The resulting change of the navigable stream works no change of boundary, irrespective of any later changes in the new stream.[47] The boundary remains marked by the former stream, and so long as water continues to run in the former stream, the boundary remains sub-

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[38] Arkansas v. Tennessee, 246 U.S. 158 (1918); Iowa v. Illinois, 147 U.S. 1 (1893).
[39] New Jersey v. Delaware, 291 U.S. 361, 379 (1934).
[40] Iowa v. Illinois, *supra* note 38, at 7-8.
[41] *Id.*
[42] H. Wheaton, Elements of International Law § 192 (8th ed. 1866).
[43] Iowa v. Illinois, *supra* note 38, at 8.
[44] New Jersey v. Delaware, *supra* note 39, at 380.
[45] Louisiana v. Mississippi, 202 U.S. 1 (1906).
[46] Arkansas v. Tennessee, *supra* note 38; Nebraska v. Iowa, 143 U.S. 359 (1892).
[47] Arkansas v. Tennessee, *supra* note 38, at 173.

ject to change by erosion and accretion. When the water of the former stream becomes stagnant, the effects of erosion and accretion are ended, and the boundary becomes forever fixed in the middle of the old channel.[48]

Thus it may be seen that, although an addition to land by the gradual process of a change in the thalweg or an accretion enlarges the riparian property, an avulsion cannot result in the enlargement of any landowner's boundary, because the boundary line remains fixed in its position immediately prior to the avulsion.

The development of the rule of avulsion might be seriously questioned, though the rule seems to be settled in the United States Supreme Court beyond dispute.[49] Early Supreme Court opinions[50] seem to place great reliance on a quotation from *Gould on Waters*[51] which stated:

> But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits between the two estates.[52]

The sentence preceding this quotation, however, is concerned with land bordered by a non-navigable stream.[53] It might easily be assumed that Gould was referring to non-navigable streams and never intended the quoted sentence to be taken out of context to define boundary rights with respect to a navigable stream. It would indeed be logical to believe that Gould was referring to a non-navigable stream in that no right of access to a navigable waterway would be lost upon the application of this rule since no navigable waterway would be in dispute.

V. Prescription and Acquiescence

Another rule of law applicable to controversies concerning land bounded by a water boundary is that of prescription and acquiescence. When a state has exercised sovereignty and dominion over a parcel of land, with the concurrent acquiescence by an adjacent state, title is held to be in the state which has exercised long dominion over the land

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[48] *Id.* at 175.

[49] It is settled beyond the possibility of dispute that . . . if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it and irrespective of subsequent changes in the new channel. Arkansas v. Tennessee, *supra* note 38, at 173.

[50] Missouri v. Nebraska, 196 U.S. 23, 35 (1904); Nebraska v. Iowa, *supra* note 46, at 361.

[51] J. Gould, A Treatise on the Law of Waters (3d ed. 1900).

[52] *Id.* § 159, at 316.

[53] *Id.*

regardless of what other boundary rules conflict with this rule.[54] The general rule concerning prescription and acquiescence between states was announced in an early decision as follows:

> No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice than in a case of disputed boundary.[55]

The prescription and acquiescence rule was originated in international law as a means of promoting peace among sovereign nations. In *Moore's Digest of International Law*[56] a number of quotations relating to this rule are cited from prominent writers on the subject:

> Title by prescription arises out of a long continued possession, where no original source of proprietary right can be shown to exist, or where, possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so.[57]

> [Prescription] is justly applicable, as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it is called, the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes the claim of every other . . . .[58]

When analogous controversies arose between states, the Court cited the above authorities in applying the prescription and acquiescence theory to the states.[59]

In *Arkansas v. Tennessee*,[60] a parcel of land had originally been on the western (Arkansas) side of the Mississippi River before Arkansas was admitted to the Union. Before its admittance as a state, the river suddenly changed its course by avulsion resulting in the land being connected to the eastern (Tennessee) side of the river. The Court held that the land became a part of the State of Tennessee since the inhabitants of the land always voted in Tennessee elections, were taxed by Tennessee, were married by Tennessee authorities and were educated

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[54] Arkansas v. Tennessee, 310 U.S. 563 (1940); Rhode Island v. Massachusetts, 45 U.S. (4 How.) 210 (1845).

[55] Arkansas v. Tennessee, *supra* note 54, at 569.

[56] 1 J. MOORE, A DIGEST OF INTERNATIONAL LAW (1906).

[57] W. HALL, INTERNATIONAL LAW § 36, at 123 (4th ed. 1895).

[58] H. WHEATON, ELEMENTS OF INTERNATIONAL LAW § 164 (8th ed. 1866).

[59] *See, e.g.*, Arkansas v. Tennessee, *supra* note 54, at 570-72; Michigan v. Wisconsin, 270 U.S. 295, 308 (1926).

[60] 310 U.S. 563 (1940).

in that state.[61] The rule that the avulsion would ordinarily have worked no change in the boundary to the Arkansas territory yielded to the rule of prescription and acquiescence after the fact had been established that there had been a long-continued and uninterrupted assertion of dominion and jurisdiction over the area.[62]

VI. Problems of Litigation

Some interesting problems are involved in litigation by individual property owners when the property is bounded by a river which is the boundary line between two states. Considering the rule that an *in rem* action to determine title must be brought in the state within whose borders the land is situated,[63] the question arises as to which state's courts have jurisdiction over the subject matter when the answer to that question decides the case. A further question might arise as to whether full faith and credit and *res judicata* precluded the losing party from bringing suit in another forum for a recovery of the land adjudged to belong to the winner of the former litigation.

A consideration of the history and result of *Durfee v. Duke*[64] provides the answers to these questions. In that case the plaintiffs, Nebraska residents, brought suit against the Missouri defendants to quiet title to a parcel of land on the Missouri River, the boundary between Missouri and Nebraska. The court stated:

> The Nebraska Court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska. Whether the land was Nebraska land depended entirely upon a factual question—whether a shift in the river's course had been caused by an avulsion or accretion . . . .[65]

The defendant appeared in Nebraska and contested the jurisdiction of the subject matter of the Nebraska court as well as fully litigating the merits of the controversy. The Nebraska court determined that the issues were in favor of the plaintiffs and quieted title in the land to them. The defendant appealed to the Supreme Court of Nebraska, and, after a trial *de novo* on the record of the lower court, affirmed the judgement finding that the avulsion rule was applicable, that the land was situated in Nebraska, and that the Nebraska courts had jurisdiction over the subject matter.[66]

The defendant did not petition for a writ of certiorari to the

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[61] *Id.* at 567.
[62] *Id.* at 571.
[63] Huntington v. Attrill, 146 U.S. 657, 669 (1892).
[64] 375 U.S. 106 (1963).
[65] *Id.* at 107-08.
[66] Durfee v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959).

Supreme Court, but rather filed suit in a Missouri court to quiet title to the same land. The suit was removed to the federal district court, and that court applied the principle of *res judicata* in dismissing the controversy. Upon appeal the appellate court held that *res judicata* did not prevent the district court in Missouri from making collateral inquiry as to the jurisdictional basis of the Nebraska judgment.[67] On final appeal the Supreme Court reversed the Court of Appeals and held that where the location of land is fully and fairly litigated in one court and the result of such litigation is that the court has jurisdiction over the subject matter, a court in a subsequent action may inquire only so far as to determine whether or not this issue was fully and fairly litigated.[68] The Court further pointed out that nothing in the controversy being litigated was binding on either Nebraska or Missouri regarding either the boundary between the states or their respective sovereignty over the land, and that either state could, at any time, initiate original proceedings against the other in the Supreme Court to determine the boundary.[69]

The decision seems reasonable since the litigation is terminated once the issue is fully and fairly litigated. All the parties are allowed to have their day in court, and the forum court is chosen by the party wishing to adjudicate the issue. It has been noted that an opposite decision by the Court (in which two inconsistent judgements would have been possible) might have led to the obvious embarrassment of each party's calling upon his respective law enforcement officer to enforce the inconsistent judgement.[70]

Questionable, however, is the fairness of a system in which a nonresident defendant is required to suffer the consequences of a judgment by a court that can be said to have a definite interest in the subject matter of the controversy. Can it be assumed that the forum is prone to decide in such a controversy that the land is within its subject matter jurisdiction since the subject matter is of interest to the forum court? This question must immediately be answered in the negative if any respect is to be given to our courts.

Two examples should suffice to show that the courts will not arbitrarily assume that the land in question is within their jurisdiction. Thirty-four years before *Durfee v. Duke*[71] an attachment suit was brought in Mississippi for rent owed by the defendant for the mooring of its

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[67] Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962).

[68] Durfee v. Duke, 375 U.S. 106, 111 (1963).

[69] *Id.* at 115-16.

[70] Currie, *Full Faith and Credit, Chiefly to Judgments; A Role for Congress*, 1964 SUP. CT. REV. 89, 105.

[71] *Supra* note 68.

barges to the banks of the plaintiff's property. The chancery court, observing the decisions of the United States Supreme Court regarding boundaries between states, dismissed the suit upon finding that the land was located in Louisiana instead of Mississippi. The Supreme Court of Mississippi affirmed this dismissal.[72] Subsequent to *Durfee v. Duke*,[73] a suit was brought in the United States District Court of Arizona seeking to quiet title to a parcel of land alleged to be on the Arizona side of the Colorado River, the boundary between Arizona and Colorado at that point. The district court concluded that the land was in California and dismissed the suit for lack of subject matter jurisdiction. This decision was affirmed by the court of appeals,[74] the court concluding that, under the applicable law announced by the Supreme Court, the land was in California.

It would seem, therefore, that the argument is not well founded that a state court or a federal court (which has been said to operate as an adjunct to the state court in a diversity case[75]), will ordinarily be biased in favor of a finding that the land is located in the state of the forum court. Further, it seems that a court, completely unrelated to any of the individual parties or to the land in question, is not presently available for a quiet title action, because suit is proper only where the land is located.[76] The availability of the original jurisdiction of the United States Supreme Court to states[77] in boundary disputes is concededly a better forum for the reasons that the bias argument has no basis (assuming that the Supreme Court has no interest in where a state boundary is decided to be) and that the Supreme Court is the best court to interpret its own decisions on the applicable law. But if the Supreme Court were granted original jurisdiction of actions between individuals concerning interstate boundary disputes, either of two undesirable results would render the system more unmanageable than it presently is. Either the Court would become so burdened by hearing the individual suits that it would have little time for its appellate work, or, the individual suits would take forever to be litigated.

It must be concluded that in the present system all of the parties are allowed their day in court and are allowed to fully and fairly litigate

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[72] Hill City Compress Co. v. West Kentucky Coal Co., 155 Miss. 55, 122 So. 747 (1929).

[73] *Supra* note 68.

[74] Sherrill v. McShan, 356 F.2d 607 (9th Cir. 1966).

[75] Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965).

[76] "The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska. . . ." Durfee v. Duke, *supra* note 68, at 107-08.

[77] U.S. CONST. art. III, § 2.

the issues. As stated in *Baldwyn v. Iowa State Traveling Men's Association*,[78] quoted by the Court in *Durfee v. Duke*:[79]

> Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.[80]

VII. Disputes

The general rules affecting boundary disputes on lands bounded by navigable streams and the history of the development of these rules are stated above. Apparently two categories of parties are involved in the litigation of such boundary controversies—private individuals[81] and states.[82] A question might arise as to how the rules stated above are applied in the disposition of these two types of suits.

In suits between individuals the plaintiff may typically bring an action to quiet title to certain lands, the visible boundaries of which may have changed over a disputed period of time. Thus in *Anderson-Tully Co. v. Walls*[83] the plaintiff brought suit to quiet title to a bar of land that had formed on the point of a tract of land in Mississippi owned by the plaintiffs. The land in controversy was bounded by the Mississippi River (the boundary between Mississippi and Arkansas at that point), and the dispute concerned whether the land was in Mississippi or Arkansas. The parties introduced evidence relevant to the movement of the river such as documents, surveys, maps, plats, and aerial photographs. An eminently qualified engineer testified to matters concerning the river's movement and the addition of land to this point.[84] An expert forester testified to the types and age of vegetation found on the land; and, based upon these findings, he gave his opinion of the age of the tract of land in controversy.[85]

The court made a thorough consideration of the evidence presented and decided that the land in controversy was formed by accretion to the point of the tract owned by the plaintiffs. The court further reviewed

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[78] 283 U.S. 522 (1931).

[79] *Supra* note 68, at 111-12.

[80] Baldwyn v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525-26 (1931).

[81] Durfee v. Duke, *supra* note 68.

[82] Arkansas v. Tennessee, *supra* note 54; Louisiana v. Mississippi, *supra* note 45.

[83] 266 F. Supp. 804 (N.D. Miss. 1967).

[84] *Id.* at 806.

[85] *Id.* at 809.

the body of rules that affect the boundaries of land bounded by navigable waters and concluded that the land formed by the accretion (which added to the point of land in Mississippi owned by the plaintiffs) was the riparian property of the plaintiffs and that title should be quieted in them.[86]

In suits between states a similar fact finding process is used to determine the nature and history of the land and river in question. These findings of fact are then applied to the rules of law in determining which state has ownership of the land. There is a difference, however, since actions between states are originally brought in the Supreme Court.[87] A special master is usually appointed by the Court to take evidence, to make findings of fact and conclusions of law, and to submit a report of these findings to the Supreme Court for final adjudication.[88]

A further difference between litigation by individuals and litigation by states is that the judgment of a suit between individuals is binding upon those parties only; whereas, the judgment in a suit between states is binding upon all individual property owners whose land is described in the judgment. Although an individual may be granted a judgment adverse to the interest of a state, the state is not bound by this judgment and can initiate proceedings in the Supreme Court to quiet title to the land.[89]

VIII. Conclusion

A consideration of the rules: [(1) the thalweg, and not the center of the stream, determines the boundary between the parties,[90] (2) accretions belong to the landowner whose land they enlarge,[91] (3) an avulsion effects no changes in a boundary from its place prior to the avulsion,[92] and (4) a party may obtain title to land otherwise found to be in another party in the application of the rules above by the doctrine of prescription and acquiescence][93] leads to the apparent inconsistency in the reasoning from which these rules were derived. Although the Court speaks of the thalweg rule in boundary determinations as recognizing and preserving the interests of the parties in obtaining equal access to the navigable stream,[94] the rule is said to completely yield to the avul-

[86] *Id.* at 814.
[87] U.S. Const. art. III, § 2.
[88] Arkansas v. Tennessee, 396 U.S. 847 (1970).
[89] Durfee v. Duke, *supra* note 68, at 115-16.
[90] *See* section III *supra*.
[91] *See* section II *supra*.
[92] *See* section IV *supra*.
[93] *See* section V *supra*.
[94] Arkansas v. Tennessee, *supra* note 38, at 170.

sion rule[95] whereby a party may totally be denied access to any water. Similarly, the avulsion rule is said to yield to the prescription and acquiescence rule.[96] Thus, it is seen that the avulsion rule is the exception to the thalweg rule, and the prescription and acquiescence rule is the exception to all of the rules.

The effect of the rule that an accretion belongs to the property owner whose land it enlarges is a protection of that landowner's access to water. The effect of ownership extending past the accretion to the thalweg is also a protection of the landowner's access to water and to the navigable stream thereof. The exception to these rules, the avulsion rule, ignores the consideration of a party's access to water. Although the courts have been silent as to the policy reasons for employing the avulsion rule, it seems that the use of this rule reflects a greater interest in the protection of an ownership right than an interest in the protection of an access to water right. In a like manner the exception to all of these rules is the prescription and acquiescence rule, which seems to reflect a greater interest in the ownership right than the access right. The above reasoning leads to the conclusion that the ownership right is the stronger right and that the access to water right is the weaker of the two.

Since the avulsion rule may have been erroneously applied to navigable streams, it might make better sense to eliminate this rule, retaining the accretion, thalweg, and prescription and acquiescence rules. This body of rules would then recognize the right of access to water as the paramount right, subject only to the loss of this when long acquiescence had taken place. Thus, if in any fact situation the right of access is a cherished right, it will be recognized, since in this situation prescription and acquiescence would never be allowed to take place.

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[95] Arkansas v. Tennseee, *supra* note 54, at 571.
[96] *Id.*

TAX: INCOME TAX CONSEQUENCES OF THE PRIVATE ANNUITY

I. Introduction

In Revenue Ruling 69-74,[1] the Internal Revenue Service changed some of its ground rules for the taxation of private annuities, diminishing somewhat the attractiveness of the private annuity as a tax avoidance device but bringing again into the tax spotlight the whole area of the private annuity transaction. A private annuity has been defined as "a transfer of property to a transferee (obligor) who has not from time to time written annuities, in consideration of the transferee's unsecured promise to make periodic payments of money, for a specified time, to the transferor of the property (annuitant)."[2] Usually the transferor is an owner of property who wants to be relieved of the duties of managing the property, but who wants to maintain a steady income and still satisfy his objectives with respect to the property's distribution.[3]

Thus, although the use of private annuities is not confined to transactions between members of the same family, they are most frequently consummated between members of a family group and usually involve a transfer of property by an older member of the family to a younger one.[4] Recognizing this fact, the Commissioner, in his heading above the body of Rev. Rul. 69-74, described the ruling as:

> Principles to be applied in determining the tax consequences of the transfer of appreciated property for a private annuity contract in an *intra-family exchange.* (emphasis added).[5]

The tax consequences of the private annuity transaction to the annuitant (transferor) and to the obligor (transferee) can best be explained by using the example incorporated by the Internal Revenue Service into Rev. Rul. 69-74:

> In the instant case, the taxpayer, age 74, transferred property (a capital asset) having an adjusted basis of $20,000, and a fair market value of $60,000, to his son in 1966, in exchange for the legally enforceable promise of the latter to pay him a life annuity of $7,200 per annum payable in equal monthly installments of $600.[6]

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[1] Rev. Rul. 69-74, 1969 Int. Rev. Bull. No. 8, at 8.

[2] Middleditch, *The Private Annuity*, 24 J. Tax. 160 (1966).

[3] Wren, *Taxation of Commercial and Private Annuities Under the Internal Revenue Code of 1954*, 26 Miss. L.J. 111, 125 (1955).

[4] Burks, *How to Use Annuities in Estate Planning*, J. K. Lasser's Estate Tax Techniques 759, 760 (1963).

[5] Rev. Rul. 69-74, 1969 Int. Rev. Bull. No. 8, at 8.

[6] *Id.*

II. Tax Consequences to the Annuitant (Transferor)

There are three main advantages of the private annuity to the annuitant: (1) the transferred property is removed from the transferor's gross taxable estate; (2) the recognition of his gain on the transferred property is partially postponed; and (3) payments received by the annuitant are favorably taxed.[7] However, as is often the case in taxable transactions, little is predictable. If the transferor is not careful to assure that he completely divests himself of all incidents of ownership, he might fail in his attempt to remove the property from his taxable estate. The Commissioner has been successful on a few occasions in including property transferred in return for a private annuity in the transferor's taxable estate as a transfer in contemplation of death, to the extent of any gift element present,[8] as a transfer with a retained life estate,[9] or as a transfer taking effect at death.[10] However, with adequate counsel and careful draftsmanship these problems can easily be avoided.

At the time of the transfer itself no taxable gain[11] or loss[12] is realized by the annuitant where the transfer is of property to an individual in exchange for the unsecured promise of such individual to make annuity payments to the transferor. Being unsecured, the promise has no ascertainable fair market value, regardless even of the obligor's solvency, and thus there is no gain realized at the time of the transaction.[13] The gain is taxed, as it is realized, as a portion of each of

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[7] Middleditch, *supra* note 2.

[8] Green v. United States, 237 F.2d 848 (7th Cir. 1956); Worcester County Trust Co. v. United States, 35 F. Supp. 970 (D. Mass. 1940), where the property was given to trustees, and an annuity income from the trustees retained.

[9] Estate of McNichol v. Commissioner, 265 F.2d 667 (3d Cir. 1959); Estate of Schwartz v. Commissioner, 9 T.C. 229 (1947).

[10] Tips v. Bass, 21 F.2d 460 (W.D. Tex. 1927), where the decedent transferred and conveyed to grantees in equal portions shares of stock in various corporations, together with several promissory notes aggregating $431,362.53. She was 68 years old at the time. Each grantee agreed by promissory note to pay the decedent $5,000 per year, but transferred to a trustee all the stocks, notes, and securities which had theretofore been transferred to them by the decedent, in order to secure payment of the grantees' annuity notes. The court held that the grantees did not come into possession and enjoyment of the property conveyed to the trustee until their mother's death, and thus the value of such property should be added to her estate for the purpose of computing the estate tax thereon.

[11] Rev. Rul. 53-239, 1953-2 Cum. Bull. 53-54.

[12] Evans v. Rothensies, 114 F.2d 958 (3d Cir. 1940).

[13] Commissioner v. Kaun's Estate, 174 F.2d 357 (3d Cir. 1949), where the court stated that where obligors are individuals, whether rich or poor, their obligations to pay possess no value by way of ordinary business; Bella Hommel v. Commissioner, 7 T.C. 992 (1947); Deering v. Commissioner, 40 B.T.A. 984 (1939); Lloyd v. Commis-

the annuity payments.[14] It is in computing the amount of each payment that is taxed as capital gain that Rev. Rul. 69-74 has its greatest effect.

The way in which the private annuity transaction was taxed under the rules in effect before the issuance of Rev. Rul. 69-74, and the way in which it is now taxed, can best be illustrated by computing the tax consequences of the example of the Commissioner from Rev. Rul. 69-74, which is set out above. Under the old rules,[15] the annuitant's investment in the contract was defined as the value of what the transferor paid for the contract. In this case it would not be $60,000, but $48,000, for in an intra-family exchange any payment for the annuity contract in excess of what a comparable annuity would cost from an insurance company is deemed to be a gift if any donative intent can be found.[16] Also, under the old rules the annuitant was allowed to recover his basis, $20,000 in the example, in the transferred property tax-free through the annual exclusion before he was taxed on his gain from the transaction.[17] Under the old rules the transferor's annual exclusion, computed under § 72 (b) of the Int. Rev. Code,[18] which is the amount of the annual payment that constitutes a return of his $48,000 investment in the contract, would be computed by dividing his investment in the

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sioner, 33 B.T.A. 903 (1936), where the obligor was a famous comedian, apparently quite wealthy and a sure risk to be able to meet the annuity payments.

However, where the transfer is to an organization such as a corporation, trust, fund, or foundation in return for an annuity, even though these organizations are not in the business of writing annuities, if they from time to time do issue annuity contracts, the commissioner has tightened up on the tax advantages to the transferor. In Rev. Rul. 62-139, 1962-2 CUM. BULL. 12, the commissioner ruled that the value of the annuity contract will be computed in accordance with the factors used by commercial insurance companies regularly issuing annuities; and if greater than the transferor's basis for the property transferred, will result in a taxable exchange resulting in gain to the transferor taxable in the year of the exchange to the extent that the present value of the payments to be made under the annuity contract exceeds the transferor's basis in the property exchanged. Thus the tax advantages of the transfer of property to charitable organizations, particularly colleges and universities, in exchange for an annuity have been circumscribed. However, the ruling fails to make clear the number of annuity contracts an organization has to have entered into before it will be covered by this ruling.

[14] Rev. Rul. 69-74, 1969 INT. REV. BULL. No. 8, at 8.

[15] *See* INT. REV. CODE of 1954, § 72 and the regulations thereunder previous to February 1969.

[16] Gillespie v. Commissioner, 43 B.T.A. 399, 128 F.2d 140 (9th Cir. 1942).

[17] 7 CCH 1969 STAND. FED. TAX REP. ¶ 8180, at 74,890.

[18] INT. REV. CODE of 1954, § 72 (b), states that gross income does not include that part of any amount received as an annuity under an annuity, endowment, or life insurance contract which bears the same ratio to such amount as the investment in the contract (as of the annuity starting date) bears to the expected return under the contract (as of such date).

contract by his expected return.[19] [$48,000 ÷ 72,720 = 66⅔%] 66⅔% of each $7,200 payment ($4,800) would be so excluded. For the first four years he would have been permitted a tax-free recovery of his basis. In the fifth year, part of the $4,800 would be a return of his basis ($800) and part would be taxed as gain ($4,000). For the next five years the $4,800 would be taxed as a gain on the transfer.[20] After ten years the $4,800 would be received tax free. During each year of payment, $2,400 of each payment would be included in the taxpayer's ordinary income as interest.[21]

Rev. Rul. 69-74 changes these procedures in two important ways. First, under the new rules the transferor's investment in the contract is the transferor's basis in the property transferred, here $20,000. Secondly, under the new rules the gain expected should be reported ratably over the period of years of the annuitant's life expectancy and only from that portion of the annual proceeds which is includable in gross income by virtue of the application of § 72 of the 1954 Code. Thus the new way to figure the exclusion ratio will give an exclusion percentage of 27.5%.[22] Twenty-seven and one-half percent of $7,200 is $1,980. The gain is figured as the excess of the value of the annuity received over the basis in the property transferred. Here, the value of the annuity received is $47,713.08, which is the present value of the right of a person, age 74, to receive a life annuity of $7,200 per year. The example the Commissioner used in Rev. Rul. 69-74 determined the present value of the annuity from U.S. Life Table 38, which is figured on only a 3½% discount. The taxpayer's basis in the property is only $20,000; therefore, the gain is $27,713.08. This is prorated over the life expectancy of a 74-year-old, 10.1 years, so that $2,743.87 of each annual payment for the first 10.1 years is taxed as gain. This will be capital gain if the property is a capital asset as defined under § 1221 or if it qualifies under § 1231. The remainder, $2,476.13 [$7,200 — ($2,743.87 + $1,980.00)], is includable in ordinary income each year as interest. If the transferor should live longer than the expected 10.1 years, the $1,980 exclusion would continue for his lifetime. However, the remainder of the $7,200 would be ordinary income.[23] Finally, the transferor would also be liable for a gift tax on $12,286.92—the

[19] The expected return for a person of any age of an annuity of $1 a year is found in Table I of Treas. Reg. § 1.72-9 (1956). Multiplying this factor by the expected annual payment under the contract will yield the present value of the expected return under the tables. Here, $7,200 multiplied by 10.1 = $72,720.

[20] Estate of Hill v. Maloney, 58 F. Supp. 164 (D.N.J. 1944).

[21] *See* INT. REV. CODE of 1954, § 72 and the regulations thereunder previous to February 1969.

[22] $20,000 ÷ $72,700 = 27.5%.

[23] Rev. Rul. 69-74, 1969 INT. REV. BULL. No. 8, at 8.

excess of the fair market value of the property transferred over the value of the annuity received—as a gift to the son from the father ($60,000 — $47,713.08 = $12,286.92).[24]

III. Tax Consequences to the Transferee (Obligor)

The tax problems of the transferee-obligor in a private annuity transaction are a little more obscure than those of the transferor, although Rev. Rul. 55-119, 1955-1 Cum. Bull. 352 attempts to set them out in detail. One thing, however, that is certain is that although the Commissioner includes a part of each payment received by the annuitant in gross income as "interest,"[25] the obligor is not allowed a corresponding interest deduction.[26] This disallowance of an interest deduction has undoubtedly been influenced by the general adoption of the "capital expenditure" theory in determining the transferee's basis in the transferred assets.[27] This view treats the annuity transaction as two transactions in one: a sale of property and the purchase of an annuity.[28] Thus the payor-transferee has been forced to capitalize the annuity payments[29] as they are made, for the transaction remains open until the death of the annuitant-transferor.[30] This parallels the Commissioner's holding that no gain is realized to the annuitant at the time of the transaction.

The two substantial problem areas for the transferee (obligor) are (1) what value to set as a basis in the property for depreciation or for determining gain or loss in case of a sale of the transferred property, and (2) what are the tax consequences of his annual payments. Rev. Rul. 55-119 attempts to clear up some of the ambiguities in these areas.[31] For the purpose of computing depreciation, 55-119 sets the basis (unadjusted)[32] of the property at the value of the prospective payments under the annuity contract (computed as of the date of the transaction in accordance with Table I of Treas. Reg. § 1.72-9 (1956),

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[24] *Id.*

[25] *Id.*

[26] Citizen's Nat'l Bank v. Commissioner, 128 F.2d 140 (9th Cir. 1942); Autenreith v. Commissioner, 115 F.2d 856 (3d Cir. 1940), where the court said that all of the annuity payment in reality was a capital expenditure for the property; Dix v. Commissioner, 46 T.C. 796 (1966).

[27] Burks, *supra* note 4, at 769.

[28] Farmer, *Private Annuities*, 101 Trusts and Estates 28 (1962).

[29] Wren, *supra* note 3, at 134.

[30] Mastin v. Commissioner, 28 F.2d 748 (8th Cir. 1928), acquiesced in by the Commissioner in Rev. Rul. 55-119, 1955-1 Cum. Bull. 352; Steinbach Kresge Co. v. Sturgess, 33 F. Supp. 897 (D.N.J. 1940).

[31] Rev. Rul. 55-119, 1955-1 Cum. Bull. 352.

[32] Meaning the basis prior to the adjustment for depreciation.

until such time as the annuity payments received equal the value of the annuity contract at the date of the transaction.

> Any annuity payments made in excess of the value of the annuity contract at the date of the transaction should be added to the basis of the property for depreciation purposes. However, upon the death of the annuitant, the basis (unadjusted) for computing any subsequent allowance for depreciation becomes the total of the annuity payments made under the contract. In the event depreciable and nondepreciable property is received, an allocation, for the purpose of computing the basis of the depreciable portion of the property, must be made on the basis of the ratio of the respective fair market values of the depreciable and nondepreciable properties at the time acquired.[33]

For the purpose of fixing a basis for determining gain or loss upon disposition of the property, the problem is more complex. If the disposition occurs after the death of the annuitant, then the unadjusted basis is simply the total of the annuity payments made under the contract. But if disposition of the property occurs before the death of the annuitant, the unadjusted basis for determining gain will be the sum total of all annuity payments made up to the time of disposition plus the present value, as of the date of disposition, of all prospective payments then to be made; the unadjusted basis for determining loss will be the total of the annuity payments made at the time of disposition. Thus obviously a situation could arise where the selling price is less than the adjusted basis for determining gain and more than the adjusted basis for determining loss. In such a situation neither gain nor loss would be recognized at the time of the sale, but whether a taxable gain or loss occurred would be determined by what occurs during the annuitant's lifetime and after the disposition of the property.

Thus there are three possibilities at the time of sale: a loss might be recognized, a gain might be recognized, or neither a gain nor a loss might be recognized. If either a gain or a loss is recognized at the time of the disposition, and subsequent events are such that the total payments made under the annuity contract (both before and after disposition) exceed the unadjusted basis used in determining the gain or loss, such excess is a loss in the year or years in which it is paid. Obviously, if there is a recognized loss at the date of disposition, all payments made thereafter will be deductible as a loss in the year in which they are paid. But also, if there is a gain recognized at the time of the property's disposition but the annuity payments continue to be made until the aggregate of the payments made exceeds the unadjusted

[33] Rev. Rul. 55-119, 1955-1 CUM. BULL. 352.

basis used for computing the recognized gain, then subsequent annuity payments are deductible as losses in the year in which they are paid. Further, if a gain is recognized upon the disposition of the property prior to the annuitant's death (because sales price exceeds the unadjusted basis, which for determining gain is the sum total of all annuity payments made up to the time of disposition plus the present value as of the date of disposition of all prospective payments), and the total of the annuity payments ultimately made is less than the unadjusted basis used in computing the gain recognized, then the excess of such unadjusted basis over the sum of the annuity payments ultimately made will constitute a gain taxable in the year the annuitant dies.[34] Finally, if, at the date of disposition of the property, neither gain nor loss is recognized; then, when the total of the payments made under the annuity contract, decreased by allowed depreciation, exceeds the selling price of the property, such excess is a loss in the year in which the payment is made. But if there is no gain or loss recognized upon the disposition of the property, and if the total of the annuity payments ultimately made decreased by allowed depreciation is less than the selling price, the excess of the selling price over this total is taxable in the year in which the annuitant dies. These tax effects are complex,[35] but with careful reading they can be understood.

A more doubtful area is that of the tax effects to the obligor of the annuity payments he makes while he still owns the property transferred to him. There are two possible theories. The first, called the annuity theory, treats the transaction as a closed-end one. Thus the transferee can deduct as a loss in the year of payment each annuity payment made after the total of annuity payments exceeds the value of the consideration paid for the annuity contract.[36] The second, called the capital expenditure theory, leaves the annuity transaction an open

[34] Thus if the transferred property sold during the annuitant's lifetime for $30,000, and at the time of sale $15,000 total in annuity payments had been made, and the present value at that time of the prospective payments (based on the annuitant's life expectancy) to be made was $10,000, then the basis for determining gain would have been $25,000, and a $5,000 gain would have to be recognized. Then the obligor continues to make payments, but the annuitant dies after only an additional $5,000 is paid to him. Thus only $20,000 would have actually been paid, but the gain on the previous disposition of the transferred property had been figured on a basis of $25,000 ultimately being paid. Thus in the year of the annuitant's death the obilgor, no longer obligated to make any payments, would realize a taxable gain of $5,000 [$25,000 — $20,000].

[35] Rev. Rul. 55-119, 1955-1 CUM. BULL. 352. This revenue ruling contains a discussion of these taxing procedures and also several examples of how they will work in practice that are very enlightening. It is important in reading them to notice the situations in which "adjusted" basis as opposed to "unadjusted" basis is the proper figure to be used in the computations.

[36] Mancina, *The Private Annuity*, 43 TAXES 255, 264 (1965).

one, treating the private annuity contract as the purchase of property for a price equal to the sum total of all the annuity payments made under the contract.[37]

The impetus for treating the transaction as a closed-end one at the time of the transfer grew out of a Treasury Office decision in 1922[38] construing the Revenue Act of 1921. This decision held that:

> [W]hen the total amount paid by the obligor equals the principal sum paid to the taxpayer, the installments thereafter paid by him will be deductible as a business expense, in case he's engaged in the trade or business of writing annuities; otherwise, they may be deducted as a loss, provided the transaction was entered into for profit.[39]

However, the hypothetical upon which this ruling is based speaks in terms of a cash consideration for the annuity contract, which is important in light of the later case decisions. This office decision of the Commissioner was adopted in 1930 by the Second Circuit Court of Appeals in the case of *Commissioner v. John C. Moore Corporation*,[40] in which the corporation obtained a conveyance of land and buildings worth $80,000, which previously had been leased by it, in consideration for agreeing to pay the transferor $10,000 a year for life. The Board of Tax Appeals had ruled that the corporation had purchased the real estate for $80,000, giving its obligation to pay the $10,000 annuity. It then discounted each payment at 6% to give it a present value as of the date of the transfer (December 26, 1912), and allowed the obligor a deduction as interest each year of the difference in the $10,000 payment and its discounted value. The circuit court stated that it was not "necessary to predicate the result upon the fiction of dividing the sale of the property and the purchase of the annuity, each for $80,000, into two transactions. An annuity writer can accept property for his annuity as well as cash."[41] Although a $10,000 annuity for the life expectancy of someone of the transferor's age, 17.4 years, would ordinarily be worth $106,173.96, the court stated that the parties were free to ignore the mortality tables and to make their own estimate of the annuitant's life expectancy.

However, the holding of *John C. Moore Corporation* has been severely limited by other cases. In *Mastin v. Commissioner*[42] the court

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[37] *Id.* at 268.

[38] I.T. 1242, I-1 CUM. BULL. 61 (1922). This ruling was submitted under INT. REV. CODE of 1939, ch. 1, §§ 23 (f), 24 (a) (2) - (3), 53 Stat. 13, 16. These sections are similar to INT. REV. CODE of 1954, §§ 165 (a), 263.

[39] *Id.*

[40] 42 F.2d 186 (2d Cir. 1930).

[41] *Id.* at 188.

[42] 28 F.2d 748 (8th Cir. 1928).

ruled that annual payments for sustenance and maintenance of relatives made in consideration of the relatives' conveyances of stock, which exceeded the value of the stock on the date of transfer, were not deductible either as losses incurred in trade (for writing annuities was not the regular business of the taxpayer) or as losses incurred in any transaction entered into for profit, though not connected with trade or business[43] (for such losses must come from closed and completed transactions). The court stated:

> There was, in our opinion, but one transaction. The consideration from Julia Mastin and Elizabeth Mastin [transferors] passed at once and as a whole. The consideration from Thomas Mastin and Theo Mastin Lovejoy [obligors] passed by installments. Whether there was a loss to Thomas Mastin and Theo Mastin Lovejoy on the transaction could not be told until the transaction was closed. It was not closed until the deaths of Julia Mastin and Elizabeth Mastin. . . .[44]

The reasoning of the Mastin case was adopted by the Eighth Circuit in the case of *Citizens National Bank v. Commissioner.*[45] There a bank was conveyed an interest in property in consideration for a payment of $200 a month during life. In distinguishing *John C. Moore Corporation,* the court said of the annuity theory which that case adopted:

> [It is] purely fictitious and bears no actual relation to the transaction between the parties. The relation in this instance is purely contractual. The bank bargained to purchase and Frank Baird to sell the right to the possession of the premises during the life of Baird. Nothing in the contract relates to the market value nor to Baird's life expectancy. The parties were at liberty to pay and receive any price agreed upon whether more or less than market value. The amount agreed upon, although payable in installments contingent as to number during life, was a capital investment and is not deductible . . . .[46]

But in 1952 the Tax Court in *Sheridan v. Commissioner*[47] applied the annuity theory in order to allow loss deductions in the year of payment for payments totalling in excess of $30,000, the amount of mortgage released by the annuitant in return for an annuity of $7,000 a year. But the court itself limited the effect of its ruling by stating clearly that it did not view the release of the mortgage as an adjustment of the purchase price of the real estate covered by the mortgage and thus intimating that if the release of the mortgage had been an adjustment of such purchase price, it would have viewed the payments as installments on the purchase price:

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[43] *See* INT. REV. CODE of 1954, § 165 (a) and (c).

[44] Mastin v. Commissioner, *supra* note 30, at 752-53.

[45] 122 F.2d 1011 (8th Cir. 1941).

[46] *Id.* at 1015.

[47] 18 T.C. 381 (1952).

> In our opinion the factual premise upon which the respondent bases his conclusion is contradicted by the evidence. The purchase price agreed to was not adjusted or affected in any way by the contract entered into in 1935, and remained the same as it had always been since 1926. The 1935 contract was sought by Irene Callord as a means of securing for herself a tax saving under the provisions for the taxation of annuity payments. . . . The contract was, in substance and effect, devoid of any purchase price adjustments or of any agreement relating to the purchase price of property. . . . In short, the conduct of the parties to the 1935 agreement, as well as the circumstances of that agreement, adequately establish that the agreement was not intended to and did not in fact constitute either in substance or effect *an adjustment of the purchase price of the real estate acquired by Donald and his uncle* from Irene Callord in 1926. On the contrary, the agreement was simply an annuity contract and the sums paid by Donald were installment payments made pursuant to that contract. (emphasis added).[48]

The Tax Court made its position clearer in *Kaufman's Inc. v. Commissioner*,[49] where, in not allowing loss deductions, the court distinguished *Sheridan*:

> In that case, however, the annuity agreement was entered into in consideration for the release of a mortgage, and not, as in the instant case, as consideration for the purchase of property where the taxable transaction to the payor will normally occur upon disposition of the property. The procurement of the release of a mortgage in consideration for the payments, of the annuity was, for all practical purposes, the same as the sale of an annuity for cash. It became a closed end transaction upon the execution of the release and the issuance of the annuity.[50]

The court in *Kaufman* denied loss deductions on the basis that the primary intention of the parties was to provide the stockholder's mother with an annuity payment of set size and to give control of the property to the obligor. Thus, it was not to enter into an annuity venture for profit. Finally, in *Rhinehart Farms, Inc. v. United States*,[51] where the taxpayer promised to pay the annuitant a life annuity or $1,000 a year in return for a quitclaim deed to property previously owned by the taxpayer, but burdened as security under a will for payment by another person of an annuity to the annuitant, the court refused to give the obligor loss deductions. Distinguishing *John C. Moore Corporation* and *Sheridan*, the court held:

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[48] *Id.* at 384.

[49] 28 T.C. 1179 (1957).

[50] *Id.* at 1184.

[51] CCH 1959 STAND. FED. TAX REP., U.S. TAX CAS. (59-1, at 71, 284) ¶ 9174 (S.D. Iowa Dec. 29, 1968).

> Petitioner further relies upon *Donald H. Sheridan*, 18 T.C. 381 (1952). In that case, however, the annuity agreement was entered into in consideration for the release of a mortgage, and not, as in the instant case, as consideration for the purchase of property where the taxable transaction to the payor will normally occur upon disposition of the property. The procurement of the release of a mortgage in consideration for the payment, of the annuity was, for all practical purposes, the same as the sale of an annuity for cash. It became a closed end transaction upon the execution of the release and the issuance of the annuity. In *Sheridan, supra*, no issue arose, and, of course, no consideration was given to the question of whether or not annuity payments paid for the acquisition of property were capital expenditures. There is no suggestion in the opinion of any intention to change or modify the rule in *Citizens National Bank of Kirksville, supra*, and other cases cited. . . .
>
> [W]hen a taxpayer acquires an interest in property for its promised payment of a sum certain per annum during the life of the transferor, its payments are expenditures for the acquisition of such property interest and must be capitalized.[52]

IV. Conclusion

From these cases it appears that an annuity venture for profit treatment, with its loss deductions where the total of annual payments exceeds the value of the consideration paid for the annuity contract, will be realized only when the annuity contract is exchanged for cash or for a release of rights similar to cash, such as a mortgage, or where it is found that the transaction was entered into for profit. However, as in the *Kaufman* case, it appears that in an intra-family exchange it will always be deemed that the intention of the parties is not to enter a venture for profit but to vest control of the property in the transferee and to guarantee the transferor an annual income; and thus all annuity payments would be treated as capital expenditures. This undoubtedly is a true characterization wherever the transaction is an intra-family exchange, as in the hypothetical in Rev. Rul. 69-74. Thus the transaction will be closed by the death of the annuitant, at which time the transferee's basis in the property would be determined. Then, upon its disposition, gain or loss on the disposition of the transferred property could be calculated.

From the above it is obvious that a great deal of ambiguity remains as to the tax consequences of the private annuity, and that future litigation and perhaps future legislation will be needed to clear up some of the problems. The Commissioner's action in Rev. Rul. 69-74 undoubtedly will make the private annuity transaction less attractive in

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[52] *Id.* at 71, 286-7.

the intra-family exchange, because of the stricter tax considerations. In the past it was possible that the transferor or his estate, if he died before his expected date of death, would escape capital gains taxes in part or in full.[53] But under 69-74 a certain percentage of the expected gain must be reported as realized each year.

With the new way of determining the investment in the contract, usually resulting in a smaller exclusion ratio, the income tax advantages to the transferor if he lives longer than expected at the time of the transaction also are lessened. In addition, the gift tax consequences and contemplation of death problems that can arise could be determinative of whether the annuity should be employed, for these can upset the advantages to the parties and may place unbearable burdens upon them. Thus if an elderly family member wishes to get the property transferred out of his estate, his life expectancy might be so short that the annuity payments which would give a discounted value approximately near the value of the property would be so large as to far exceed the income producing potential of the property and the ability of the transferee, usually a younger, less established family member, to pay. But if smaller payments are contracted for, the gift element and its tax burden upon the transferor might become so large as to outweigh the transferor's desire to rid himself and his estate of the property. However, these are considerations which must be weighed as each case arises, and hard and fast rules for when to use the private annuity in these situations are impossible to determine.

But it is important that the tax effects of the transaction are publicized, for the private annuity provides a means by which estate and income taxes can be reduced or avoided. In keeping with the current administrative and legislative emphasis upon removing some of the tax advantages to the wealthy,[54] the Commissioner has altered the

[53] Farmer, *supra* note 28, at 29.

[54] A question that naturally arises is why the Commissioner did not close the transaction in a situation where property is exchanged for an unsecured promise to pay an annuity. To do so the Commissioner would have to attempt to overturn a long line of cases, set out above, that hold that the unsecured promise to pay in a private annuity can have no ascertainable value.

This doctrine appears to be too well entrenched to be overturned by a revenue ruling. However, it would appear that it also is supported by the practicalities of the situation. Where one purchases property for a promise to pay the transferor a set sum per annum for life, there is no way of ascertaining definitely the amount that ultimately is going to be paid before the transferor's death. Realistically, the property is being purchased for the sum total of the annuity payments that ultimately will be made. Depending on when the transferor dies, of course, this might be one payment or fifty. The purchase is not for any fixed sum, but is for an annual amount payable for life.

Nevertheless, the private annuity is a tax shelter of possible advantage to the

tax consequences of the transaction. However, even after the alteration the private annuity provides an attractive method for the disposition of appreciated property which both taxpayers and their advisors should investigate.

Woods Eastland

APPENDIX I

FORM OF A PRIVATE ANNUITY AGREEMENT*

Agreement

This agreement is made this .... day of ....., 19...., by and between ....., hereinafter referred to as transferor and ....., hereinafter referred to as transferee.

Recitals

A. Transferor is now the owner of that certain property hereafter referred to as "the property," and more particularly described as: [insert here the legal description of any real property or any other description of property sufficient to specifically identify the property].

B. The transferor desires to transfer, sell and assign to the transferee all his right, title and interest in and to the property [if only an undivided portion of the property is transferred, then this clause must be so modified], and the transferee desires to purchase the property upon the terms and conditions as more fully set forth hereinafter.

Covenants and Agreements

In consideration of the mutual covenants and agreements herein contained the parties hereto mutually promise as follows:

1. The transferor hereby transfers, sells, conveys and assigns, and transferee hereby purchases all of the right, title and interest in and to that certain property heretofore described in paragraph A of this agreement. [If an undivided interest is transferred this clause must be modified.]

2. As consideration for said transfer, sale, assignment and conveyance, the transferee agrees to pay to the transferor the following:

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wealthy. If the Commissioner wished to remove some of its advantages, he might force all of the payments received after the expiration of the transferor's life expectancy as of the date of the transaction to be included in gross income in each year paid. It seems that in view of firm court decisions that unsecured promises to pay have no ascertainable value, this is about all he can do.

* This form is reprinted from P-H 1966 Tax Ideas-Transaction Tax Guide @ 26,009.5.

a. For the lifetime of ....., the sum of $..... a year [or a month, or quarterly or otherwise] payable on the ..... day of ..... the first payment to be made on ....., 19.....

b. [If the annuity is to be for several joint lives or one life followed by another life, insert appropriate provisions here, such as the following—after the death of ....., the sum of $..... a year, payable to Jane Doe ..... for her lifetime payable the ..... day of ..... the first payment to be made on the 10th day of the month following the death of .....]

c. The aforesaid payments are to be paid directly to the transferor but in the event of disability or incapacity of the transferor, the transferee may make the required payments on behalf of said transferor or such payments may be made to any person authorized in writing by the transferor to receive such payments.

d. The aforesaid payments shall cease and there shall be no requirement of any further payment upon the death of the transferor [or the following wording in the event there is more than one life—upon the death of the last survivor of the transferors].

3. The aforesaid payments to be made to the transferor shall be made irrespective of any income earned by the property or any other reference to the property. Said payments are obligation of the transferee and are not limited in any way to the value of the property, whether at the time of execution of this agreement or in any future time, and in the event the transferee should sell, assign, pledge, hypothecate or in any other way deal with the property, the liability to make the aforesaid payments to the transferor shall nevertheless continue and shall be fully enforceable by the transferor. The right is hereby given to the transferee to sell, transfer, assign, pledge, or hypothecate the property free and clear of any claims whatsoever of any kind or nature by the transferor and it is specifically understood and agreed that the payments to be made to the transferor are not secured by the property.

4. This agreement is made in the State of ..... and should be enforced and construed in accordance with the laws of that state.

5. In the event either party engages legal counsel to enforce his rights hereunder or in the event of litigation in connection with this agreement, the prevailing party shall be entitled to his reasonable attorney's fees so incurred, which shall be paid by the other party.

6. No waiver by either of the parties as to any breach of any provision of this agreement shall be deemed for any purpose whatsoever a waiver of any continuing or subsequent breach of the same provision or any other provision of this agreement.

_____

Transferor

_____

Transferee

STUDENT NOTES

Municipal Corporations— The Governmental-Proprietary Distinction and Municipal Tort Immunity Begin to Fall in Mississippi

I. Introduction

By statute, every municipality in Mississippi can be made the defendant in a legal action.[1] However, municipal liability to suit is not absolute. For many years the courts of this state, along with tribunals in the vast majority of American jurisdictions, have circumscribed municipal tort liability by distinguishing between governmental and proprietary functions of municipal corporations. Simply expressed, the distinction is that "a city is not liable for torts committed in the exercise of governmental functions, but is liable while exercising proprietary or ministerial functions."[2] Thus, the Supreme Court of Mississippi, while awarding damages for negligence in the performance of a proprietary function,[3] has adhered to "the well-established rule that a municipality is not liable for the negligence of any of its municipal officers, agents, or employees while engaged in the performance of a governmental function or duty . . . ."[4]

To the surprise of those who were certain that the governmental-proprietary distinction was a firmly entrenched doctrine in Mississippi, the state supreme court recently made a cautious retreat from that doctrine. The retreat was prompted by a malfunctioning traffic signal in the small municipality of Okolona, Mississippi. Because of the malfunction, two automobiles collided in the intersection controlled by the traffic signal. A motorist injured in the mishap brought suit against the City of Okolona for negligence in maintaining the traffic light. The trial court, believing that the maintenance of traffic signals was a governmental function in which a municipality enjoyed tort immunity, sustained a demurrer by the City of Okolona and dismissed the action. In *Tucker v. City of Okolona*,[5] the Mississippi Supreme Court reversed. Speaking for the court, Presiding Justice Gillespie declared that in maintaining a traffic signal a municipality "acts in its proprietary capacity and is liable for damages sustained by a motorist as a result of negligence in the operation and maintenance of such traffic control light."[6]

This holding in *Tucker v. City of Okolona* placed the Mississippi Supreme Court in a decidedly minority position. The strongly held majority viewpoint in the United States is that "a municipality may not be held liable . . . for an injury resulting from the failure to keep

[1] Miss. Code Ann. § 3374-112 (Supp. 1968).

[2] Hobbs, *The Tort Liability of Municipalities*, 27 Va. L. Rev. 126 (1940).

[3] City of Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329 (1911).

[4] City of Meridian v. Beeman, 175 Miss. 527, 536, 166 So. 757, 758 (1936).

[5] 227 So. 2d 475 (Miss. 1969).

[6] *Id.*

traffic lights functioning properly."[7] The courts of Alabama,[8] Florida,[9] Georgia,[10] Kentucky,[11] Louisiana,[12] Missouri,[13] New Jersey,[14] New York,[15] North Carolina,[16] Ohio,[17] Oklahoma,[18] Tennessee,[19] and Texas[20] have all promulgated this principle. In the words of the Supreme Court of Alabama:

> [W]e are of the opinion that the city, in installing the signal lights to warn and direct the traveling public, was exercising a governmental function, under its police power, and, this being true, the city was not answerable in damages to the plaintiff for any failure of the city, its agents, employees, or officers in permitting the traffic light to be or to remain out of repair. . . .[21]

By ruling that the maintenance of traffic lights is a proprietary function, the Supreme Court of Mississippi assumed a posture hitherto held only by the Supreme Court of Illinois.[22] Why would the Mississippi court adopt such a position, particularly in view of the fact that adjacent jurisdictions have long held otherwise? It is the opinion of this commentator that the decision of *Tucker v. City of Okolona* represents, not a conviction that the operation of traffic lights is inherently a governmental function of municipalities, but an implicit condemnation of the traditional governmental-proprietary distinction

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[7] 18 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.42, at 234-35 (3d ed. revised 1963). *See also* Annot., 161 A.L.R. 1404 (1946).

[8] Dorminey v. City of Montgomery, 232 Ala. 47, 166 So. 689 (1936).

[9] Avey v. City of West Palm Beach, 152 Fla. 717, 12 So. 2d 881 (1943).

[10] Stanley v. City of Macon, 95 Ga. App. 108, 97 S.E.2d 330 (1957).

[11] Sandmann v. Sheehan, 279 Ky. 614, 131 S.W.2d 484 (1939).

[12] Terrill v. ICT Ins. Co., 93 So. 2d 292 (La. App. 1957); Edwards v. City of Shreveport, 66 So. 2d 373 (La. App. 1953). *Cf.* Vidrine v. General Fire & Cas. Co., 168 So. 2d 449 (La. App. 1964), where the liability insurer representing the City of Ville Platte was not allowed to raise the defense that upkeep of traffic control signals is a governmental function, on the ground that such a defense is available exclusively to a municipality, not to its insurance company.

[13] Auslander v. City of St. Louis, 332 Mo. 145, 56 S.W.2d 778 (1933).

[14] Vickers v. City of Camden, 122 N.J.L. 14, 3 A.2d 613 (1939).

[15] Parsons v. City of New York, 273 N.Y. 547, 7 N.E.2d 685 (1937); Cleveland v. Town of Lancaster, 239 App. Div. 263, 267 N.Y.S. 673 (1933).

[16] Hodges v. City of Charlotte, 214 N.C. 737, 200 S.E. 889 (1939).

[17] Martin v. City of Canton, 41 Ohio App. 420, 180 N.E. 78 (1931).

[18] City of Ardmore v. Hendrix, 348 P.2d 497 (Okla. 1960).

[19] Powell v. City of Nashville, 167 Tenn. 334, 69 S.W.2d 894 (1934).

[20] Glover v. City of South Houston, 424 S.W.2d 723 (Tex. Civ. App. 1968); Voight v. City of Corpus Christi, 419 S.W.2d 445 (Tex. Civ. App. 1967); Burchett v. City of Stanton, 262 S.W.2d 952 (Tex. Civ. App. 1953); Parson v. Texas City, 259 S.W.2d 333 (Tex. Civ. App. 1953); Baker v. City of Waco, 129 S.W.2d 499 (Tex. Civ. App. 1939).

[21] Dorminey v. City of Montgomery, *supra* note 8, 166 So. at 691.

[22] *See* Johnson v. City of East Moline, 405 Ill. 460, 91 N.E.2d 401 (1950). For an earlier statement that the maintenance of traffic lights should be considered a proprietary function, see Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEM. PROB. 214, 227 (1942).

permeating municipal tort law. That distinction is an anachronism—an archaic doctrine that legal scholars have termed an "enigma"[23] and an "absurdity."[24] *Tucker v. City of Okolona* appears to be a first step, hesitant and cautious though it is, on the road toward eliminating the governmental-proprietary distinction as a viable facet of Mississippi law.

How is it that municipal tort immunity resulting from the governmental-proprietary distinction became an established principle in this state and, indeed, throughout the nation? Why is it that the distinction has survived the virtually unanimous condemnation of the authors of more than two hundred law review articles[25] published since the turn of the century? This study will attempt to answer these questions. It will also investigate the origins of the governmental-proprietary distinction, trace its development in the United States, analyze its application in Mississippi, and survey the emerging trend toward repudiation of the concept.

II. The Roots of the Governmental-Proprietary Distinction

The roots of the governmental-proprietary distinction, which has given rise to municipal tort immunity, lie partially in the historic Anglo-American jurisprudential concept of sovereignty. Inherent in the notion of sovereignty is the tenet that "the King can do no wrong." As one political scientist has explained in analyzing sovereignty: "For reasons inherent in sovereignty, the state historically has been beyond suit. The English King, for instance, who represented the state's sovereignty, could not unless he consented be sued in his own courts. For the sovereign to be amenable to suit would be inconsistent with the idea of sovereignty."[26] The American Founding Fathers appropriated this English concept. As Alexander Hamilton pointed out during the struggle for ratification of the Constitution: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its* [the sovereign's] *consent*. This is the general sense and the general practice of mankind . . . ."[27]

Distinguished American jurists have followed the lead of Hamilton. In 1857 Chief Justice Taney declared: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or any other, without its consent and permission . . . ."[28] A half century later Mr. Justice Holmes reaffirmed this view by stating: "A sovereign is exempt from suit, not because of any

[23] Price and Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330, 354 (1953).

[24] Fuller and Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 462 (1941).

[25] Price and Smith, *supra* note 23, at 330 n.1.

[26] Vanlandingham, *Local Governmental Immunity Re-Examined*, 61 NW. U. L. REV. 237, 247-48 (1966).

[27] THE FEDERALIST No. 81, at 487 (Mentor ed. 1961).

[28] Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857).

formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[29] Or, as Mr. Justice Holmes announced in a later discourse on sovereignty: "Also we must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rules that it applies to others the consent is free and may be withheld."[30]

This philosophy of sovereignty has been judicially extended into municipal law to exempt municipal corporations, as agents of the state, from tort liability. As one expert has explained:

> In the absence of statute, it has always been the law that no private action for tort will lie against the state, since negligence cannot be imputed to the sovereign. So, in the various localities or local areas where the state agencies merely perform governmental functions of the state and acquire no individual corporate existence, they stand as the state, and, therefore, to hold them responsible for negligence would be the same as holding the sovereign power answerable for its actions . . . .[31]

The Supreme Court of Mississippi endorsed this view of sovereignty in the early years of the twentieth century. Speaking through Chief Justice Mayes, the court recognized that there was no municipal tort liability for "public or governmental duties of a city . . . given by the state to the city as part of the state's sovereignty . . . ."[32]

Sovereignty is not the only source of the governmental-proprietary distinction; the English common law is also an important progenitor. In fact, most American jurisdictions have traced the doctrine of municipal tort immunity for governmental functions to the 1788 English case of *Russell v. Men of Devon*.[33] In that decision Chief Justice Lord Kenyon ruled that the plaintiffs, in a suit to recover for damages to their wagon caused by a local bridge left in a state of disrepair, could not maintain an action against the inhabitants of Devon County. (In view of the reverence subsequently afforded *Men of Devon* by American courts, it is significant to note that the defendant in the case was not an incorporated municipality, but the local gentry of an unincorporated English county.)

The concurring opinion by Justice Ashurst in *Men of Devon* contains the oft-quoted pronouncement that it "is better that an individual should sustain an injury than that the public should suffer an inconvenience."[34] Such a belief, which is "repugnant to modern minds,"[35]

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[29] Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

[30] The Western Maid, 257 U.S. 419, 432 (1922).

[31] 18 E. McQUILLIN, *supra* note 7, § 53.24, at 167-68. *See also* 38 AM. JUR., *Municipal Corporations* § 572, at 261 (1941).

[32] City of Pass Christian v. Fernandez, *supra* note 3, at 82, 56 So. at 329.

[33] 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788). *But see* the scholarly opinion of the Wyoming Supreme Court in Maffei v. Incorporated Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959), concluding that the doctrine of municipal tort immunity had its genesis prior to the *Men of Devon* decision of 1788.

[34] Russell v. Men of Devon, *supra* note 33, at 673, 100 Eng. Rep. at 362.

[35] Vanlandingham, *supra* note 26, at 243.

can be explained in large measure by the conditions prevailing in England in 1788. The idea of a local corporate entity was still in the formative stages, and there were no local funds out of which damages could be paid to plaintiffs in circumstances like those of the *Men of Devon* case. These considerations, when combined with a lack of precedent for suits against localities and the fear that allowing one plaintiff to recover would lead to a deluge of actions against local authorities, prompted the tort immunity concept arising out of *Men of Devon*.[36] But the political, social, and economic conditions of eighteenth-century England have little relation to contemporary American society.

Just how the holding in *Russell v. Men of Devon* crossed the Atlantic Ocean to become an established rule in American jurisprudence is "one of the mysteries of legal evolution."[37] The first references to the *Men of Devon* case in American law were made by the Supreme Judicial Court of Massachusetts in its early decisions of *Riddle v. Proprietors of the Locks and Canals on Merrimack River*[38] and *Mower v. Inhabitants of Leicester*.[39] By 1842, when Chief Justice Nelson of New York recognized that municipal officers carrying out governmental duties were not liable in tort,[40] the doctrine of municipal tort immunity flowing from *Men of Devon* was becoming well entrenched throughout the United States.

III. The Governmental-Proprietary Distinction in Mississippi

The courts of Mississippi readily accepted the governmental-proprietary distinction as a cornerstone of municipal tort law. They held state municipalities liable for negligence in carrying out proprietary duties but immune from tort actions arising out of the performance of governmental functions. At times the Mississippi Supreme Court has had difficulty separating governmental from proprietary functions. As the court admitted in a 1918 decision: "The line of demarcation between governmental functions or duties, in the performance of which a municipality is not liable, and the exercise of other corporate duties for which it is, is often difficult to determine."[41]

Despite this difficulty, the supreme court has nevertheless proceeded—with a logic that has not always been precise—to label various municipal activities as either proprietary or governmental. The court has for many years held that the construction and maintenance of streets and sidewalks are proprietary activities, for which municipalities may be held liable.[42] The duty to keep streets and sidewalks reasonably

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[36] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 1004 (3d ed. 1964).

[37] Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924).

[38] 7 Mass. 169 (1810).

[39] 9 Mass. 247 (1812).

[40] Bailey v. Mayor of City of New York, 3 Hill 531 (N.Y. 1842).

[41] City of Hattiesburg v. Geigor, 118 Miss. 676, 684-85, 79 So. 846 (1918). *See also* 18 E. MCQUILLIN, *supra* note 7, § 53.01a, at 105-06.

[42] City of Laurel v. Upton, 253 Miss. 380, 175 So. 2d 621 (1965); Rowe v. City of Winona, 248 Miss. 411, 159 So. 2d 282 (1964); Logan v. City of Clarksdale, 240

safe extends "to warding against defects from overhead as well as [from] underfoot."[43] The holding that the repair of streets is a proprietary activity has not been absolutely followed; in one decision the court ruled that a city exercises a governmental function in working its prisoners upon the streets.[44]

As the upkeep of streets and sidewalks is generally considered to be a proprietary duty, so too are the operation of a municipal airport[45] and the maintenance of a city zoo.[46] On the other hand, the operation of a municipal hospital[47] and the maintenance of a city hall[48] are governmental functions for which a municipality is not liable in tort. The basis for such fine distinctions is not readily apparent.

The Supreme Court of Mississippi has further held that a municipality acts in a proprietary capacity when it constructs gutters, drains, and sewers;[49] when it hauls trash;[50] or when it operates a city garbage dump.[51] But if sanitation department employees exercise proprietary duties for which a municipality can be held liable, members of the fire and police departments carry out governmental duties in which municipal corporations enjoy tort immunity.[52] Amid this illogical jumble of governmental and proprietary distinctions, it is no wonder that almost forty years ago one Mississippi commentator was moved to write, "The question of municipal liability is in an unsatisfactory condition."[53]

The Mississippi Supreme Court made its most comprehensive delineation of those municipal activities which are governmental and for which there is no tort liability in a 1928 decision. Said the court:

Miss. 716, 128 So. 2d 537 (1961); Bishop v. City of Meridian, 223 Miss. 703, 79 So. 2d 221 (1955); City of Vicksburg v. Harralson, 136 Miss. 872, 101 So. 713 (1924); City of Vicksburg v. McLain, 67 Miss. 4, 6 So. 774 (1889); Whitfield v. City of Meridian, 66 Miss. 570, 6 So. 244 (1889).

[43] City of West Point v. Berry, 218 Miss. 739, 743, 67 So. 2d 729, 730 (1953). *See also* Barron v. City of Natchez, 229 Miss. 276, 90 So. 2d 673 (1956); City of Hattiesburg v. Hillman, 222 Miss. 443, 76 So. 2d 368 (1954).

[44] Warren v. Town of Booneville, 151 Miss. 457, 118 So. 290 (1928).

[45] Brummett v. City of Jackson, 211 Miss. 116, 51 So. 2d 52 (1951).

[46] Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925).

[47] City of Leland v. Leach, 227 Miss. 558, 86 So. 2d 363 (1956).

[48] Jones v. City of Amory, 184 Miss. 161, 185 So. 237 (1939).

[49] Hawkins v. City of Natchez, 242 Miss. 91, 133 So. 2d 610 (1961); Semple v. City of Vicksburg, 62 Miss. 63 (1884).

[50] City of Pass Christian v. Fernandez, *supra* note 3.

[51] City of West Point v. Meadows, 236 Miss. 394, 110 So. 2d 372 (1959).

[52] Hall v. City of Jackson, 30 F.2d 935 (5th Cir. 1929); Simpson v. Poindexter, 241 Miss. 854, 133 So. 2d 286 (1961); City of Hattiesburg v. Buckalew, 240 Miss. 323, 127 So. 2d 428 (1961); Anderson v. Vanderslice, 240 Miss. 55, 126 So. 2d 522 (1961); Bates v. City of McComb, 181 Miss. 336, 179 So. 737 (1938); City of Meridian v. Beeman, *supra* note 4; City of Hattiesburg v. Geigor, *supra* note 41; Alexander v. City of Vicksburg, 68 Miss. 564, 10 So. 62 (1891).

[53] Vinsel, *Liabilities of Municipal Corporations in Mississippi*, 3 MISS. L.J. 298, 316 (1931).

> In the establishment and regulation of schools, hospitals, poorhouses, fire departments, police departments, jails, workhouses, and police stations, municipalities act in their governmental capacity. . . . [I]t also appears from the authorities to be equally well settled that municipalities, in the adoption and enforcement of ordinances and regulations for the prevention of the destruction of property by fire or flood, and the manner and the character of the construction of buildings, act in their governmental capacity . . . .[54]

The injustices that can arise out of such a rule are obvious. A pedestrian run down by an improperly driven police car, a school child injured in the collapse of a school building certified as safe by the municipal building inspector, a patient in a municipal hospital who suffers grievous injury when negligently tended by hospital personnel—none of these parties would be able to maintain an action against a city under the existing doctrine of municipal tort immunity. Perhaps these gross inequities explain why the Mississippi Supreme Court began to back away from the doctrine in *Tucker v. City of Okolona.*

IV. The Continuing Dissatisfaction with the Governmental-Proprietary Distinction

The artificiality of the governmental-proprietary distinction has evoked a veritable landslide of critical comment.[55] "Almost all legal scholars, and students of government generally, have for years condemned the principle of local governmental immunity and urged its abolition."[56] As early as 1900, Mr. Justice White questioned

> the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated

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[54] Bradley v. City of Jackson, 153 Miss. 136, 159, 119 So. 811, 816 (1928).

[55] The classic work in the field is Professor Edwin M. Borchard's six-part study that was published in the Yale Law Journal almost half a century ago. Despite its age, this treatise, an example of truly brilliant legal scholarship, is still of immense value. *See* Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25); Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926-27). Among the other leading criticisms of the governmental-proprietary distinction are Antieau, *The Tort Liability of American Municipalities*, 40 KY. L.J. 131 (1951); Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937); Fuller and Casner, *supra* note 24; Green, *Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Hobbs, *supra* note 2; Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954); Price and Smith, *supra* note 23; Ropes, *Torts' Doctrine of Municipal Immunity—A Myth*, 8 MIAMI L.Q. 555 (1954); Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41 (1949); Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97 (1932); Warp, *The Law and Administration of Municipal Tort Liability*, 28 VA. L. REV. 360 (1942). For a recent expression of dissatisfaction with the governmental-proprietary distinction, see Comment, *A Case for the Abrogation of Municipal Tort Immunity in Mississippi*, 41 MISS. L.J. 289 (1970).

[56] Vanlandingham, *supra* note 26, at 250-51.

> as having two distinct capacities, the one private or corporate, and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrongs. . . .[57]

Many state courts have also deprecated the governmental-proprietary distinction. In 1919 the Supreme Court of Ohio, in allowing a person injured by a municipal hose truck to sue the city, recognized the "unsatisfactory and unjust results" of a rule "which exempts municipalities from liability for all acts which have loosely been classed as governmental."[58] In 1942 the Supreme Court of New Mexico quoted a text-writer and leveled the following barrage at the governmental-proprietary distinction:

> 'The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.'[59]

Despite such judicial criticism and despite the previously mentioned flood of legal articles castigating the rule of municipal tort immunity, the overwhelming majority of American states continued to apply the governmental-proprietary distinction through the decade of the 1950's.[60] Then in 1957 the Supreme Court of Florida tossed a bombshell into the usually placid world of municipal law. In the decision of *Hargrove v. Town of Cocoa Beach*[61] the Florida court ruled that municipalities in that state were no longer immune from negligence in the exercise of governmental functions. This holding established a modern watershed in American municipal law. Since the *Hargrove* decision, which "marked the beginning of a series of state supreme court decisions abrogating, or at least modifying, the common law doctrine of local governmental immunity for torts due to negligence,"[62] the legal principles governing municipal tort liability in the United

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[57] Workman v. City of New York, 179 U.S. 552, 574 (1900).

[58] Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72, 73 (1919).

[59] Baker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480, 482 (1943), *citing* Annot., 75 A.L.R. 1196 (1931). For an earlier statement that the English legal maxim that "the King can do no wrong" has no place in the American system of government, see the opinion of Mr. Justice Miller in Langford v. United States, 101 U.S. 341 (1879).

[60] Annot., 60 A.L.R.2d 1198, 1200 (1958).

[61] 96 So. 2d 130 (Fla. 1957). For an immediate reaction to this decision, see Note, *Liability of a Municipal Corporation for Torts Committed by its Agents*, 29 Miss. L.J. 240 (1958).

[62] Vanlandingham, *supra* note 26, at 237.

States have been "undergoing essential modification."[63] The recent Mississippi decision of *Tucker v. City of Okolona* appears to be an offshoot of that modification.

V. The Emerging Trend: The Governmental-Proprietary Distinction Falls by the Wayside

The catalyst that precipitated the *Hargrove v. Town of Cocoa Beach* decision was a wrongful death action brought by the widow of a man who died of suffocation while incarcerated in a smoke-filled jail cell evidently left unattended by the town jailer. The trial court dismissed the complaint, holding that the operation of a jail was a governmental function for which Florida municipalities were not liable in tort. The reversing opinion by the Florida Supreme Court, which concluded that the foundations of the municipal tort immunity doctrine had no applicability to contemporary American life, is worthy of close perusal. Speaking for the court, Justice Thornal enunciated:

> Immunization in the exercise of governmental functions has been traditionally put on the theory that 'the King can do no wrong. . . .' In applying this theory the courts have transposed into our democratic system the concept that the sovereign is divine and that divinity is beyond reproach. In preserving the theory, they seem to have overlooked completely the wrongs that produced our Declaration of Independence and in the ultimate resulted in the Revolutionary War. We, therefore, feel that the time has arrived to declare this doctrine anachronistic not only to our system of justice but to our traditional concepts of democratic government.
>
> The immunity theory has been further supported with the idea that it is better for an individual to suffer a grievous wrong than to impose liability on the people vicariously through their government. If there is anything more than a sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a remedy for every wrong committed, then certainly the basis for this rule cannot be supported.[64]

Justice Thornal then proceeded to analyze the previously discussed English case of *Russell v. Men of Devon*, the "ultimate progenitor" of the American rule that municipalities are not liable in tort for negligence in the exercise of governmental functions. He opined that American courts should not have implanted the *Men of Devon* holding in the municipal law of this country in that it dealt with an unincorporated area, not a municipal corporation. Justice Thornal further intimated that, since *Men of Devon* was decided twelve years after the Declaration of Independence, it was not a part of the English common law binding on American courts.[65] Stating that "the

[63] 18 E. McQUILLIN, *supra* note 7, § 53.24a, at 179.

[64] Hargrove v. Town of Cocoa Beach, *supra* note 61, at 132.

[65] *Id. But see* Maffei v. Incorporated Town of Kemmerer, *supra* note 33.

time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be," Justice Thornal concluded his opinion by holding that Florida municipalities may no longer claim tort immunity for the actions of their agents while carrying out governmental tasks.[66]

Shortly after the *Hargrove* decision was handed down, courts of other states began to follow the trail blazed by the Supreme Court of Florida. Colorado's supreme court was the first. In abolishing the traditional precept of local tort immunity, the Colorado tribunal stated: "In Colorado 'sovereign immunity' may be a proper subject for discussion by students of mythology but finds no haven or refuge in this Court."[67] In 1959 the Illinois Supreme Court followed suit. In holding a school district liable for an injury to a student caused by the negligence of a bus driver, the Illinois court emphasized that the old rule of tort immunity was "unjust, unsupported by any valid reason, and has no rightful place in modern day society."[68]

In 1961 the supreme courts of two populous urban states launched their jurisdictions into the swelling current sweeping away the concept of municipal tort immunity. The Michigan Supreme Court, speaking through Justice Edwards, announced:

> From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan. . . . We eliminate from the case law of Michigan an ancient rule inherited from the days of absolute monarchy which has been productive of great injustice in our courts. By so doing, we join a major trend in this country toward the righting of an age-old wrong.[69]

California also joined the trend in 1961. In an opinion by the nationally respected Roger J. Traynor, who was later to became Chief Justice of his state, the California Supreme Court proclaimed that the "rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by force of inertia."[70]

In the ensuing year the supreme courts of Wisconsin,[71] Minnesota,[72]

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[66] Hargrove v. Town of Cocoa Beach, *supra* note 61, at 133.

[67] Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582, 585 (1957). *But see* Liber v. Flor, 143 Colo. 205, 353 P.2d 590 (1960), in which, over three vigorous dissents, the Colorado Supreme Court retreated to the traditional rule by finding a county not liable in tort for the negligent conduct of its agents.

[68] Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89, 96 (1959).

[69] Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1, 20 (1961).

[70] Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 359 P.2d 457, 460 (1961).

[71] Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

[72] Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962). Prompted by this decision, the Minnesota Legislature soon enacted a statute expressly providing that ". . . every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function." MINN. STAT. ANN. § 466.02 (1963).

and Alaska[73] overruled the concept of municipal tort immunity. In 1963 the Arizona Supreme Court did the same. In an opinion by Justice Lockwood, that court stated:

> After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled.
>
> Sovereign or governmental immunity began with the personal prerogatives of the King of England upon the theory that 'the King can do no wrong,' and even though a very early date in American history we overthrew the reign of the English King the doctrine somehow became entrenched in our judicial code. . . . Its survival for such a great period of time in this country, where the royal prerogative is unknown, has perhaps been even more remarkable, considering it has been universally criticized as an anachronism without rational basis. . . .[74]

The courts of six other states—Kentucky,[75] Indiana,[76] New Jersey,[77] Arkansas,[78] Nebraska,[79] and Rhode Island[80]—have more recently declared that municipalities in their states are no longer immune from tort suits for negligence in their governmental activities. Thus, since 1957 at least fifteen American jurisdictions have judicially discarded the traditional doctrine of municipal tort immunity. A trend has definitely been established.

VI. The Traditional Municipal Tort Immunity Doctrine Refuses to Die

The flood tide sweeping away the archaic governmental-proprietary distinction has, however, been checked in some states by either judicial or legislative dikes. The retrogression of the Colorado Supreme Court to the traditional rule has already been recounted.[81] In two states, Illinois and Michigan, the state legislatures responded to judicial abrogation of the municipal tort immunity doctrine by enacting that anachronism into state law.[82] State supreme courts in several jurisdictions, while disparaging the traditional tort immunity rule as outmoded, have felt that the burden of changing such a long established doctrine

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[73] City of Fairbanks v. Schaible, 375 P.2d 201 (Alas. 1962). *See also* Scheele v. City of Anchorage, 385 P.2d 582 (Alas. 1963).

[74] Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107, 109 (1963).

[75] Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964). *See also* City of Lexington v. Yank, 431 S.W.2d 892 (Ky. 1968); City of Louisville v. Chapman 413 S.W.2d 74 (Ky. 1967).

[76] Brinkman v. City of Indianapolis, 231 N.E.2d 169 (Ind. App. 1967).

[77] Bergen v. Koppenal, 97 N.J. Super. 265, 235 A.2d 30 (1967).

[78] Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968).

[79] Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968).

[80] Becker v. Beaudoin, 261 A.2d 896 (R.I. 1970).

[81] *See* cases cited, note 67 *supra*.

[82] ILL. ANN. STAT., ch. 85, §§ 1-101 *et seq.* (Smith-Hurd 1966); MICH. STAT. ANN. § 3.996 (107) (Rev. 1969).

more properly falls on the state legislature. For example, as early as 1925, the Supreme Court of Wyoming said:

> While we are not unmindful of the force of the criticisms of this rule of immunity, we think the rule has become so well fixed as a part of the law of municipal corporations of this country that it is not to be disregarded by the courts until the Legislature declares a different policy.[83]

In the years following the landmark decision of *Hargrove v. Town of Cocoa Beach* rendered by the Florida Supreme Court in 1957, several other tribunals have adopted a stance similar to that taken by the Wyoming court in 1925 and declared elimination of the municipal tort immunity rule to be a matter solely for the legislature. As Chief Justice Williamson of Maine discoursed:

> The policy of immunity from liability for tort . . . has been so long established and so long acted upon that only the clearest and most convincing reasons should compel a reversal by our Court. It cannot be questioned that Legislatures and the people of the State from 1820 have acted or refrained from acting in reliance upon sovereign immunity.
>
> . . . We may agree that sovereign immunity from tort liability has served its usefulness and ought to be destroyed. These are reasons directed, in our opinion, to the determination of the policy of the State, and not to the construction of legislative acts in the process of ascertaining the intent of the Legislature.
>
> The issue is not complex. Should sovereign immunity in tort, time tested in our State, be discarded or destroyed? This is a policy question which, in our opinion, is more properly directed to the Legislature than to the Court. . . .[84]

Similarly, courts in Missouri,[85] New Mexico,[86] Iowa,[87] West Virginia,[88] Utah,[89] North Dakota,[90] Maryland,[91] Kansas,[92] Texas,[93] New Hampshire,[94] South Dakota,[95] and Tennessee[96] have recently declared that

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[83] Ramirez v. City of Cheyenne, 34 Wyo. 64, 241 P. 710, 712 (1925).

[84] Nelson v. Maine Turnpike Auth., 157 Me. 474, 170 A.2d 687, 693 (1961).

[85] Grillen v. City of St. Louis, 345 S.W.2d 69 (Mo. 1961). *See also* Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963).

[86] Clark v. Ruidoso-Hondo Valley Hosp., 72 N.M. 9, 380 P.2d 168 (1963).

[87] Boyer v. Iowa High School Athletic Ass'n, 256 Iowa 337, 127 N.W.2d 606 (1964).

[88] Cunningham v. County Court of Wood County, 148 W. Va. 303, 134 S.E.2d 725 (1964).

[89] Hurst v. Highway Dep't, 16 Utah 2d 153, 397 P.2d 71 (1964).

[90] Fetzer v. Minot Park Dist., 138 N.W.2d 601 (N.D. 1965).

[91] Weisner v. Board of Educ. of Montgomery County, 237 Md. 391, 206 A.2d 560 (1965).

[92] Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966).

[93] Luvaul v. City of Eagle Pass, 408 S.W.2d 149 (Tex. Civ. App. 1966).

[94] Gossler v. City of Manchester, 107 N.H. 310, 221 A.2d 242 (1966).

[95] Conway v. Humbert, 82 S.D. 317, 145 N.W.2d 524 (1966).

[96] Coffman v. City of Pulaski, 220 Tenn. 642, 422 S.W.2d 429 (1967).

abolition of the governmental-proprietary distinction and abrogation of the municipal tort immunity rule are matters for exclusively legislative determination. Only last year the Supreme Court of Alabama ruled that "the question of whether the doctrine of sovereign immunity should be modified is a matter which addresses itself to the legislature."[97] The Supreme Court of Pennsylvania also took this position in 1969,[98] but only over one justice's forceful dissent from what he termed "this Court's continuing blind adherence to the doctrine of sovereign immunity."[99]

VII. The Future of Municipal Tort Immunity in Mississippi

There is evidence that the Supreme Court of Mississippi also believes that it is the responsibility of the legislature to modify the long-standing rule of municipal tort immunity. As the court emphasized in a 1961 opinion:

> The principle of municipal immunity is deeply entrenched and involves profound considerations of policy as well as problems of public finance. While some writers criticize the doctrine . . . the overwhelming majority of the courts of the several States adhere to the rule. If any change is to be made it should be brought about by legislation so that all aspects of the problem could receive consideration.[100]

It is understandable that the Mississippi Supreme Court, having made such a statement only eight years earlier, was hesistant in *Tucker v. City of Okolona* to adopt expressly and specifically the proposition advanced by appellant's counsel that the "rule extending immunity to municipal corporations for torts committed in a governmental capacity is unjust and outmoded and should be overruled."[101] Yet the decision in *Tucker v. City of Okolona* intimated that the court is moving to accept that proposition.

There is ample precedent in this state for judicial abrogation of a tort immunity canon. Prior to 1951 charitable institutions in Mississippi were immune from tort actions. The supreme court had determined that "charitable institutions administered solely for charity and not for benefit, and which do not receive profit from the operation of such institutions, are not liable for the negligence of their servants and physicians . . . ."[102] But in 1951 Chief Justice McGehee led a

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[97] Jenkins v. Houston County Hosp. Bd., 223 So. 2d 583, 585 (Ala. 1969).

[98] Thomas v. Bard, 433 Pa. 482, 252 A.2d 653 (1969).

[99] *Id.* at 655.

[100] Anderson v. Vanderslice, *supra* note 52, at 57-58, 126 So. 2d at 523.

[101] *See* Brief of Appellant, Tucker v. City of Okolona, No. 45,467, on file in the office of the Clerk of the Supreme Court of Mississippi, State Capitol, Jackson, Mississippi. This brief was prepared by Mr. David B. King, a member of the Mississippi State Bar and a partner in the firm of Patterson, King & Lee, Aberdeen, Mississippi.

[102] Mississippi Baptist Hosp. v. Moore, 156 Miss. 676, 687, 126 So. 465, 468 (1930). *See also* International Order of Twelve of Knights and Daughters of Tabor in Miss. v. Barnes, 204 Miss. 333, 37 So. 2d 487 (1948); Pace v. Methodist Hosp. of Miss., 130 So. 468 (Miss. 1930).

unanimous court in overturning the charitable immunity doctrine in Mississippi and in holding a hospital liable for the death of a patient caused by a hospital technician's negligent mislabeling of blood. Chief Justice McGehee said:

> In response to what appeared good as a matter of public policy at an early date, many of the courts have created an immunity, which, under all legal theories, is basically unsound, and especially so, when the reasons upon which it was founded no longer exist. Moreover, the function of creating a public policy is primarily one to be exercised by the Legislature and not by the courts. It is equally true that where the reason for the existence of a declared public policy no longer obtains, the court should, without hesitation, declare that such policy no longer exists, and especially where the same has been created by the courts instead of by the Legislature.[103]

This statement is as applicable today to the doctrine of municipal tort immunity as it was in 1951 to the rule of charitable immunity. Certainly a patient in a municipal hospital is entitled to the same protection as that given to patients in charitable hospitals by *Mississippi Baptist Hospital v. Holmes.* Certainly, too, a child run down by a city fire truck or an innocent citizen physically abused by an overzealous municipal police officer should be afforded a legal remedy. For as Chief Justice Marshall announced in one of the landmark decisions of the United States Supreme Court: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[104]

The time has come to lay to rest the governmental-proprietary distinction and the traditional rule of municipal tort immunity in Mississippi. Ideally this burial should be carried out by the legislature through the "enactment of a carefully drawn governmental responsibility statute."[105] If the legislature does not act on this matter, however, then the Mississippi Supreme Court, it is respectfully urged, should take the first opportunity to abolish the rule of municipal tort immunity in this state. *Tucker v. City of Okolona* could serve as a convenient springboard to such a determination.

In this modern age, when the activities of municipal corporations touch and affect the lives of citizens in countless ways and when liability insurance, the premiums for which can be diffused among all taxpayers, is readily available to municipalities, it is patently unjust, illogical, and senseless for municipal tort immunity to remain as a viable principle of Mississippi law. For as Mr. Justice Holmes proclaimed three-quarters of a century ago:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down

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[103] Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 931, 55 So. 2d 142, 152 (1951), *sugg. of error overruled,* 56 So. 2d 709 (1952).

[104] Marbury v. Madison, 1 U.S. (1 Cranch) 137, 163 (1803).

[105] Vanlandingham, *supra* note 26, at 241.

have vanished long since, and the rule simply persists from blind imitation of the past. . . .[106]

James A. Peden, Jr.

Insurance—Should an Injured Third Party Have a Direct Right of Action?

I. Introduction

If an automobile accident occurs as a result of the negligence of an insured party, he turns the matter over to his insurance company. Even though he may ultimately have to pay the amount of a judgment which exceeds the limits of his protective policy, his position is far better than that of the injured third party. The injured party soon finds out that he must bring suit against the owner of the other vehicle rather than against the owner's liability company;[1] for, unless a statute or policy provides otherwise, a person injured by the negligent operation of an automobile whose owner is insured against the consequences of such negligence has no direct cause of action against the insurer.[2]

In Mississippi a direct action will not lie against the liability insurer.[3] Furthermore, Mississippi does not allow the plaintiff in a personal injury action to introduce evidence that the defendant is protected by insurance,[4] and, conversely, the defendant may not show that he does not carry liability insurance.[5] Nevertheless, if reference to liability insurance is made by the defendant or his counsel, the defendant may not complain.[6] The same rule applies no matter whether the forum is state or federal.[7] Even though the literal language of Rule 18(b) of the Federal Rules of Civil Procedure would permit a joint action against a tortfeasor and his liability insurer, such joinder

[106] Holmes, *Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). This familiar statement by Mr. Justice Holmes may also be found in his Collected Legal Papers 187 (1920).

[1] Allen, *Why Do Courts Coddle Automobile Indemnity Companies?* 61 Am. L. Rev. 77 (1927).

[2] 6 D. Blashfield, Cyclopedia of Automobile Law and Practice § 4071, at 102 (1945) [hereinafter cited as Blashfield]. *See also* J. Appleman, Insurance Law and Practice § 4811, at 164 (1962).

[3] *See* McArthur v. Maryland Cas. Co., 184 Miss. 663, 186 So. 305 (1939).

[4] *See, e.g.*, Shelby Mut. Ins. Co. v. Phillips, 260 F. Supp. 799 (N.D. Miss. 1966); Scott County Coop v. Brown, 187 So. 2d 321 (Miss. 1966); Morris v. Huff, 238 Miss. 111, 117 So. 2d 800 (1960); Snowden v. Skipper, 230 Miss. 684, 93 So. 2d 834 (1957); Byram v. Snowden, 224 Miss. 74, 79 So. 2d 541 (1955); Chilcutt v. Keating, 220 Miss. 545, 71 So. 2d 472 (1954); Ward v. Mitchell, 216 Miss. 379, 62 So. 2d 388 (1953); Lancaster v. Lancaster, 213 Miss. 536, 57 So. 2d 302 (1952); Walley v. Williams, 201 Miss. 84, 28 So. 2d 579 (1947); Odom v. Walker, 193 Miss. 862, 11 So. 2d 452 (1943); Herrin v. Daly, 80 Miss. 340, 31 So. 790 (1902).

[5] Avent v. Tucker, 188 Miss. 207, 194 So. 596 (1940).

[6] Lancaster v. Lancaster, *supra* note 4; Peterman v. Gary, 210 Miss. 438, 49 So. 2d 828 (1951).

[7] *See* Shelby Mut. Ins. Co. v. Phillips, *supra* note 4.

has been held not permissible where it contravenes the law or public policy of the state where the federal court sits.[8] The courts have held that this is a substantive rather than a procedural question and thus not controlled by Federal Rule 18(b).[9] However, one leading authority on the Federal Rules has urged that the U.S. Supreme Court's holding in *Hanna v. Plummer*[10] is sufficiently broad to authorize joinder.[11]

II. Exceptions to the Present Rule

Although the plaintiff is not permitted to show that the defendant is protected by liability insurance, the mere fact that evidence may disclose that the defendant is so insured does not necessarily make such evidence inadmissible.[12] If the evidence is relevant to a material issue in the case or is used to impeach the credibility of a witness, it is admissible despite the possibility of prejudice to the defendant.[13] For example, in *Ingalls Shipbuilding Corp. v. Trehern*[14] the court held that where the defendant introduced testimony which discredited one of the plaintiff's witnesses, cross examination of the defendant's witness disclosing that he was an insurance adjuster employed by the defendant's liability insurer was proper.

In the early case of *Finkbine Lumber Co. v. Cunningham*,[15] which was an action by a servant for injuries, the Mississippi Supreme Court held that where the defendant claimed that a servant was employed by an independent contractor and was not its servant, evidence that the defendant carried accident insurance on the servants of the alleged independent contractor was admissible to show that the defendant was the real master. Disclosure of liability insurance has also been held permissible where a plaintiff in good faith asked a testifying physician whether he went to the hospital to examine the plaintiff as a representative of the insurance company[16] and where a defendant truck owner was asked whether the truck involved in the accident was used in his brick and tile business or in his insurance business. These questions were allowed because their purpose was to find out what the truck was being used for, and they did not carry to the jury information or reasonable inference that the witness carried liability insurance on the truck.[17] In addition, disclosure was permissible where a witness in a personal injury action inadvertently said, "The insurance man asked me to sign something";[18] where a contract which contained a provision that the contractor was protected by property damage insurance was

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[8] Annot., 61 A.L.R.2d 702 (1958).

[9] *Id.* at 704-05.

[10] 380 U.S. 460 (1965).

[11] 3A J. MOORE, FEDERAL PRACTICE § 18.08 [2], at 2013-14 (2d. ed. 1969).

[12] Black, *Admissibility of Evidence That Defendant Has or Has Not Liability Insurance*, 38 W. VA. L.Q. 362, 363 (1932).

[13] *Id.* at 363.

[14] 155 F.2d 202 (5th Cir. 1946).

[15] 101 Miss. 292, 57 So. 916 (1912).

[16] Mississippi Ice & Util. Co. v. Pearce, 161 Miss. 252, 134 So. 164 (1931).

[17] Savery v. Gray, 51 So. 2d 922 (Miss. 1951).

[18] City of Jackson v. Reed, 233 Miss. 280, 102 So. 2d 342 (1958).

introduced to show a relation creating duty;[19] and where liability insurance certificates were introduced to show a course of conduct which established a principal-agent relationship.[20]

Under the prevailing view the plaintiff's counsel may question prospective jurors about their possible employment by or interest in an insurance company where it appears that the defendant is protected by insurance.[21] This is the preferable view because the plaintiff has a right to have jurors who are unprejudiced and free from personal interest in the results of the case and because of the right of counsel to examine each juror to be sure that he is not biased, which is an integral part of the common law procedure in America.[22] In *Yazoo City v. Loggins*[23] the Mississippi Supreme Court held that such an examination is proper so long as it is conducted in good faith to discover the state of mind of the jurors regarding such interests.

III. Weaknesses of the Present Rule

The exclusionary rule is based chiefly on the assumption that if the jurors discover that the defendant has insurance, they will likely award excessive damages which they will consider are to be paid by an affluent and heartless insurance company that has already been paid for taking the risk.[24] In condradiction of this assumption Professor McCormick says:

> [W]hen we consider the ways in which the fact of insurance may be properly disclosed in evidence or suggested at the beginning of the trial upon the examination of the jurors, and the fact that insurance has become usual rather than exceptional, it seems likely today that in nearly all cases the jury will either be informed of the fact of insurance or will consciously assume that the defendant is so protected.[25]

The essence of the policy of non-disclosure is discarded when the court allows the plaintiff's counsel to examine jurors concerning their connection with insurance companies,[26] since a juror knows there

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[19] Building Insulators, Inc. v. Stuart, 243 Miss. 287, 136 So. 2d 613 (1962).

[20] Luke Const. Co. v. Jernigan, 252 Miss. 9, 172 So. 2d 392 (1965). *See also* Tippit v. Hunter, 205 So. 2d 267 (Miss. 1967), where the court held that there was no error in the interrogation of a witness for injuries arising from an automobile accident because there was no hint that the insurance discussed was automobile liability insurance.

[21] C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 168, at 356-57 (1954).

[22] Allen, *supra* note 1, at 79.

[23] 145 Miss. 793, 110 So. 833 (1927). *See also* Shearron v. Shearron, 219 Miss. 27, 68 So. 2d 71, (1953), *aff'd on liability and damages with remittitur*, 219 Miss. 27, 69 So. 2d 801, *sugg. of error overruled in part and sustained in part*, 219 Miss. 27, 70 So. 2d 922 (1954); Kennedy v. Little, 191 Miss. 73, 1 So. 2d 163 (1941); Avery v. Collins, 171 Miss. 636, 157 So. 695 (1934); Lee County Gin Co. v. Middlebrooks, 161 Miss. 422, 137 So. 108 (1931).

[24] 2 J. WIGMORE, EVIDENCE § 282(a), at 133-34 (3d. ed. 1940).

[25] C. McCORMICK, *supra* note 21, § 168, at 357.

[26] *Id.* at 358.

is some reason for his being questioned about the subject, and he does not require a "brick house to fall on him to give him an idea."[27] Every juror knows that responsible persons carry liability insurance on the car they drive or own, and so long as insurance is not featured or made the basis at the trial for an appeal to increase the damages, the disclosure would seem to be harmless.[28]

One of the most serious drawbacks of the present rule is its basic unfairness to the injured plaintiff. The insurance company is given the exclusive right under the usual policy to employ counsel, defend the suit, and settle or contest the claim.[29] Yet it is ashamed to show its face in court and admit its true relation to the litigation before the court and jury.[30] For all practical purposes the insurance company is the real party in interest since it is the party which is ultimately responsible for the judgment which is rendered.[31] Also to be considered are the right of the plaintiff to know the identity of the party with whom he is contesting and the right of the court to know the true party who is using its facilities and officers.[32]

Juries are more mature now, and a frank admission at trial of the existence of insurance and its limits, together with an aboveboard revelation of the insurer's interest in the outcome of the action against the insured, should be more advantageous to insurers in reducing overall policy judgment payments than the unrealistic and unreasonable "ostrich head in the sand" approach which leaves juries to speculate as to the existence and policy limits of insurance.[33]

In some instances delays of the insured in filing proof of claim, claims of excess or of other insurance, claims of misrepresentation, failure to seek early arbitration, and a variety of other defenses growing out of the policy provisions are used by the insurance company to defeat recovery by the injured third party.[34]

IV. Direct Action by the Insured as an Alternative Remedy

Ordinarily a direct right of action in this context is statutory in character and is not provided for by the policy terms of an insurance contract.[35] Such a statute attempts to create a contract for the benefit of a third party which permits him to proceed directly against the insurer to collect any judgment due him from the insured.[36] There are several types of direct action statutes which protect various classes of injured third parties in the following states: Alabama, Arkansas, California, Georgia, Idaho, Iowa, Kansas, Louisiana, Massachusetts, New

[27] Connelly v. Nolte, 237 Iowa 114, 21 N.W.2d 311, 320 (1946).
[28] Odegard v. Connolly, 211 Minn. 342, 1 N.W.2d 137, 139 (1941).
[29] C. McCORMICK, *supra* note 21, § 168, at 358.
[30] Allen, *supra* note 1, at 79.
[31] *Id.* at 89.
[32] C. McCORMICK, *supra* note 21, § 168, at 358.
[33] Shingleton v. Bussey, 223 So. 2d 713, 718 (Fla. 1969).
[34] *Id.* at 719.
[35] 6 BLASHFIELD, *supra* note 2, § 4071, at 105.
[36] *Id.* at 109-10.

Jersey, New York, Ohio, Rhode Island, Texas, Washington, and Wisconsin.[37] A direct action by the injured party against the automobile liability insurer has been held to be a tort action for the injuries sustained rather than a contract action on the policy.[38]

Courts in at least two states, Florida and Illinois, allow the injured plaintiff to join the liability insurer in a negligence action brought against the insured notwithstanding that these states have no direct action statute. This approach goes a step beyond the procedure used over fifty years ago by the Minnesota court in *Patterson v. Adan*,[39] where it was held that when an injured party brings suit against the insured and the insurance company takes sole charge of the defense as it had the right to do under the policy, a judgment against the assured becomes, among plaintiff, defendant, and the company, a liability or debt owed unconditionally by the company to the assured which the plaintiff may reach by garnishment.[40]

In the recent Illinois case of *Gothberg v. Nemerovski*[41] the court avoided using such a circuitous method to hold the company liable and allowed the injured party to bring a direct action against the liability insurer. The court held that the injured party could be considered a third party beneficiary of the insurance contract, even though his identity may not have been known at the time the contract was made. The court also recognized that automobile insurance can no longer be considered a private contract between the company and the assured.[42] This court's reasoning was adopted by the Florida Supreme Court in *Shingleton v. Bussey*.[43] There the court held that the public policy of the state gives the third party beneficiary a direct cause of action against the liability company.[44] The court relied somewhat on the Financial Responsibility Law of the state[45] and on Rule 1.210(a) of the Florida Rules of Civil Procedure[46] which provided that "any person may be made a defendant who has or claims an interest adverse to the plaintiff." However, the heart of the decision is found in the following paragraphs:

> It seems anomalous to public policy to procedurally sanction and condone a situation where the ultimate beneficiary of the policy proceeds is deprived by a provision in the policy of an open, speedy and realistic opportunity to pursue by due process his right of adequate remedy at law jointly against the insured

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[37] *Id.* § 4112.5 *See also* J. APPLEMAN, *supra* note 2, §§ 4833 *et. seq.* (1962), for an explanation of the various circumstances under which these statutes become operative.

[38] 6 BLASHFIELD, *supra* note 2, § 4112.5, at 190.

[39] 119 Minn. 308, 138 N.W. 281 (1912).

[40] *See also* Elliot v. Aetna Life Ins. Co., 100 Neb. 833, 161 N.W. 579 (1917); Davies v. Maryland Cas. Co., 89 Wash. 571, 154 P. 1116 (1916); Maryland Cas. Co. v. Peppard, 53 Okla. 515, 157 P. 106 (1915).

[41] 58 Ill. App. 2d 372, 208 N.E.2d 12 (1965).

[42] *Id.* at 20.

[43] 223 So. 2d 713 (Fla. 1969).

[44] *Id.* at 715.

[45] *Id.* at 716.

[46] *Id.* at 718-19.

> and insurer. Especially is the result obtained by such policy restriction incongruous where the insurer participates in the controversy, not as a joint defendant . . . but, rather, as the undisclosed guardian of the interests and rights of the insured—and of course, of the insurer's interests also . . . .[47]
> . . . If joinder is allowed initially, all the cards are on the table and all interrelated claims and defenses can be heard and adjudicated reciprocally among all parties and the plaintiff will have the same initial right as the insurer now avails itself against plaintiff to protect his rights against the insurer . . . .[48]

V. Conclusion

The purpose of this note has been to examine the present rule of non-disclosure in Mississippi which prevails in litigation initiated by an injured third party against an insured defendant. It is hoped that the courts of this state will reconsider the desirability of such a policy. Two considerations stand out as most important. First, the insurance company is actually a real party in interest. It is, in reality, the company, not the insured, with whom the injured plaintiff must negotiate a settlement or litigate a claim. Second, the jurors are likely to assume that the defendant is protected by insurance whether it is specifically brought to their attention or not. Thus the insurance company will not likely be prejudiced by disclsoure. But if the defendant does not have insurance, he may be dealt with unfairly by the jury in the belief that insurance will cover any damages awarded to the plaintiff. If a direct action by way of joinder is permitted against the company, the jury will know that the defendant has no insurance protection unless an insurer is joined as a party.

The approach taken by the Florida and Illinois courts has much to commend it, and the courts of this state would do well to join with them in charting a more progressive and satisfactory course for the adjudication of such claims.

Richard L. Foreman

Damages—The Landowner's Right to Damages as a Result of a Second Pipe Line

I. Introduction

Much of Mississippi is covered by underground steel pipes that carry oil and gas from Louisiana and Texas to the industrialized East. Landowners in Mississippi often are faced with the prospect of having a pipe line cross their property. Seldom do these landowners have a choice, for they can be compelled by the courts to grant these rights of way.[1] Often, either to avoid costly litigation, or through ignorance, landowners sign agreements that subject their lands to virtually perpetual easements that allow pipe line companies to lay additional lines years

[47] *Id.* at 719.

[48] *Id.* at 719-20.

[1] Miss. Code Ann. §§ 2749-82 (Supp. 1968) (eminent domain chapter).

after the original easement was granted and the first pipe line laid. The easement agreements usually provide only token consideration for the land taken and exempt the company from damages except for specific items, few in number, enumerated in the agreement.

The Mississippi Supreme Court recently decided a case that epitomizes the problems presented when a landowner whose property is burdened by a pipe line easement sues for damages that result from a second pipe line. In *Baker v. Columbia Gulf Transmission Co.*[2] the Mississippi Supreme Court granted the plaintiffs, owners of the land over which the pipe line passed, the right to recover all damages that resulted from the construction of a second pipe line on an old easement, though not parallel to the original pipe line. The court was careful to grant recovery solely on the basis of the wording of the agreement. However, this makes the opinion interesting, for the court had two distinct damage clauses to construe—a general damage clause solely for construction and a "crops" damage clause. This note will attempt to analyze both of these damage clauses in relation to the conclusion reached by the Mississippi Supreme Court. This note will also examine two problems which this case presented but which were left unsolved by the Mississippi Supreme Court.

II. The Court's Interpretation of the Agreement

The agreement,[3] prepared by Columbia Gulf Transmission Company, granted in addition to the right of way for construction of the original pipe line, the right to lay additional lines for one dollar per lineal rod of additional pipe line laid. Nowhere in the agreement was there any limitation upon the width of the right of way, nor were the additional pipe lines required to be parallel to the original line, which was laid in 1955. The agreement provided for payment for damages to growing crops and fences arising from construction, maintenance, or operation of the lines.

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[2] 218 So. 2d 39 (Miss. 1969).

[3] The three paragraphs essential to the opinion have been set out here. (The numbering is the court's.)

> (2) By the terms of this agreement, Grantee has the right to lay, construct, maintain, operate, alter, repair, remove, change the size of, and replace at any time or from time to time one or more additional lines of pipe and appurtenances thereto, said additional lines not to necessarily parallel any existing line laid under the terms of this agreement. Provided however, that for each additional line laid after the first line is laid hereunder, Grantee shall pay Grantor, his heirs or assigns, One Dollar ($1.00) per lineal rod of additional pipe line laid under, upon, over or through said hereinabove described property.
>
> (4) Grantee hereby agrees to bury the pipe line to a sufficient depth so as not to interfere with cultivation of the soil and agrees to pay for any damage to growing crops and fences which may arise from the construction, maintenance and operation of said lines. Said damage, if not mutually agreed upon, shall be ascertained and determined by three disinterested persons . . . .
>
> (6) It is understood and agreed that the sum of _____ Dollars per rod as damages in full will be paid to the Grantors herein by the Grantee herein before the said pipe line is laid and the Grantors herein hereby agree that said sum of _____ Dollars per rod will be accepted by said Grantors as full and complete settlement for any and all damages (real or alleged) occasioned by the construction of said pipe line on and across the above described land. *Id.* at 40-41.

The sixth paragraph of the agreement provided for payment for all damages occasioned by the construction of said pipe line, but the blanks which were provided for the amount were not filled in.[4] In 1965 a second pipe line was constructed on the plaintiffs' land. Baker claimed damages for destroyed timber, for destroyed pine seedlings which had been planted, and for appropriation of 12.85 acres of land.[5] The court stated that the question for decision "is whether the terms of the right of way agreement limit plaintiffs' right to damages to that done to growing crops and fences."[6] The court held that the plaintiffs' right to damages was not limited to growing crops and fences, but included all damages occasioned by the construction of the second pipe line. The court's conclusion was based upon an interpretation of the instrument.

However, the court expressly stated that the instrument was to be construed most strongly against the grantee in this instance because the agreement was on a printed form drawn up by the grantee, Columbia Gulf Transmission Company.[7] In particular the court said that the clause providing for payment of damages for crops and fences applied primarily to damages arising from maintenance and operation after construction and that the sixth paragraph of the agreement obligated the grantee to pay for "all damages" occasioned by "construction"[8] of the pipe line. The court concluded that the plaintiffs were entitled to recover for the destroyed timber and pine seedlings under the sixth paragraph of the agreement. The court did not allow recovery for appropriation of the 12.85 acres of land because the right of way agreement granted to Columbia Gulf the right to appropriate and use the land that was required in order to construct the pipe line.[9]

III. The Necessity of Negligence for Recovery Under a Crops Damage Clause

Even though the court in *Baker* did not base its decision on the clause providing for compensation for damages to crops, was it possible for the court to reach the same result using only the crops clause? Mineral deeds, easements, and pipe line rights of way frequently contain strikingly similar provisions to the one found in *Baker*.[10] The grantee expressly agreed to pay for damage to the surface of the land resulting from the exercise of the rights granted in the easement contract. This type of provision is best exemplified by the clause relating to damage to "crops" or "growing crops," but the clause frequently contains other items such as "timber," "fences," "premises," or "improvements."[11] Most jurisdictions that have interpreted this type of clause

[4] *Supra* note 3, at ¶ 6.

[5] Baker v. Columbia Gulf Transmission Co., *supra* note 2, at 41.

[6] *Id.*

[7] Ashcot, Inc. v. Texas Eastern Transmission Corp., 241 Miss. 392, 129 So. 2d 405 (1961); Hamilton v. Transcontinental Gas Pipeline Corp., 236 Miss. 429, 110 So. 2d 612 (1959).

[8] Baker v. Columbia Gulf Transmission Co., *supra* note 2, at 42.

[9] *Id* at 43.

[10] *Supra* note 3, at ¶ 4.

[11] Annot., 87 A.L.R.2d 236 (1963).

have reached similar conclusions on one issue—that there is no need to prove negligence by the pipe line company when the easement specifically provides for damages. The conclusion is summarized thus:

> [I]n all those [jurisdictions] allowing a recovery that under a provision in a mineral deed or lease, or in a conveyance of a pipeline or other underground easement, whereby the lessee or grantee agrees to pay for damages to crops or growing crops, the lessee or grantee is liable for such damages caused by him in the exercise of the rights granted even though he is not guilty of negligence.[12]

The Mississippi Supreme Court has expressly affirmed this interpretation of the "crops" clause in *Transcontinental Gas Pipe Line v. Myrick*.[13] The court said:

> Now the damages to fences, improvements, growing crops and timber caused by utilizing the right of way as such are recoverable by specific provision without reference to negligence in construction.[14]

The court went on to say in *Myrick*: "But for this provision doubt would arise since a proper construction of the pipe line would of necessity cause damage of this kind."[15] The *Myrick* holding, negating the need for negligence when a "crops" damage clause is in the agreement, was expressly approved by the Mississippi Supreme Court in *Transcontinental Gas Pipe Line Corporation v. Hill*.[16] The position taken by the Mississippi Supreme Court in the above cases (*Myrick* and *Hill*) is supported by numerous holdings in other jurisdictions,[17] all of which have held that negligence need not be present to sustain an action for damages when a crops damage clause is found in the easement agreement. Since such a clause is found in *Baker*,[18] the plaintiff would be entitled to recover for damage to his crops as a result of operation, maintenance, or construction regardless of negligence by Columbia Gulf Transmission Company. Recovery, however, would be limited to "crops."

IV. What Are Crops?

It would seem that the courts would have little difficulty defining the limits of the crops damage clause, yet there has been much litigation involving the definition of crops. In *Moore v. Hope Natural Gas*

[12] *Id.* at 237.

[13] 51 So. 2d 475 (Miss. 1951).

[14] *Id.* at 477.

[15] *Id.*

[16] 57 So. 2d 162 (Miss. 1952).

[17] Williams v. Northern Natural Gas Co., 136 F. Supp. 514 (N.D. Iowa 1955), *appeal dismissed*, 235 F.2d 782 (8th Cir. 1956); McLeod v. Cities Service Gas Co., 131 F. Supp. 449 (D. Kansas), *aff'd*, 233 F.2d 242 (10th Cir. 1956); Rohner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. App. 1958); Texas Pipe Line Co. v. Cobb, 365 P.2d 1010 (Okla. 1961); Premier Petroleum Co. v. Box, 255 S.W.2d 298 (Tex. Civ. App. 1953); Shell Pipe Line Corp. v. Coston, 35 S.W.2d 1056 (Tex. Civ. App. 1931).

[18] *Supra* note 3, at ¶ 4.

Co.,[19] the West Virginia court said that the term "crops" is generally understood to mean something which is cropped or harvested from the land.[20] This limited definition has been expanded as the concept of "farming" has been extended through diversification and scientific methods. In *Cities Service Gas Co. v. Christian*[21] the Oklahoma Supreme Court defined "growing crops" to include blue-stem grass used to feed cattle.[22] The court reasoned that if the pipe line company had obtained the easement by a condemnation proceeding, the plaintiff farmer would have been entitled to recover damages to all property or property rights that would be damaged or destroyed by the construction of the pipe line.[23]

The Oklahoma court not only included grasses as "growing crops," but it also recognized that trees and shrubs could be "growing crops." The court allowed recovery for damages to native pecan trees that were growing on the right of way.[24] The holding that the pecan trees were "growing crops" within the meaning of provisions in the pipe line agreement was supported by *Superior Oil Co. v. Griffin*.[25] The Oklahoma court rejected the contention that such trees were produced by the power of nature alone and thus could not be considered as crops.[26] The Texas courts have also held that pecan trees can be classified as crops.[27] Even though fact situations are often diverse and the instruments themselves are written somewhat differently, the courts are attempting to compensate the property owner for crop damage under the specific clauses found in the right of way and easement agreements.[28]

Columbia Gulf Transmission specifically alleged that the "crops" provision in the right of way agreement under which they possessed the easement across Baker's land did not cover pine seedlings and timber.[29] This allegation gave the Mississippi court ample opportunity to define crops explicitly and thus use the crops clause as a narrow basis for recovery. With the numerous precedents already discussed the court could have granted the plaintiff, Baker, compensation for the damages to his crops—pine timber and pine seedlings—as a result of the construction, maintenance, and operation of the pipe line. However, as the court construed the agreement in the *Baker* case, the sixth paragraph provided the basis for recovery.[30] To interpret the agreement in this manner, the court had to reject a contrary holding by the

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[19] 76 W. Va. 649, 86 S.E. 564 (1915).

[20] *Id.*

[21] 340 P.2d 929 (Okla. 1959).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] 357 P.2d 987 (Okla. 1960).

[26] *Id.*

[27] Shell Pipe Line Corp. v. Svrcek, 37 S.W.2d 297 (Tex. Civ. App. 1931).

[28] *See* Annot., 87 A.L.R.2d 236 (1963). This annotation provides numerous cases whereby the reasoning of the courts may be examined.

[29] Baker v. Columbia Gulf Transmission Co., *supra* note 2, at 41.

[30] *Id.* at 42.

Tennessee Court of Appeals in *Scott v. Columbia Gulf Transmission Co.*[31]

V. The Scott Case

Even though the plaintiffs in the *Scott* case were not trying to recover damages for pine seedlings and timber as were the plaintiffs in *Baker*, the plaintiffs were asking the Tennessee court to interpret the sixth paragraph[32] of their agreement so they could recover for all damages occasioned by the construction of the pipe line and not be limited to damages for growing crops and fences.[33]

Even though the Tennessee court was interpreting exactly the same right of way agreement, even to the point of having the blanks in the sixth paragraph incomplete, the Tennessee court upheld the trial judge's finding that the stipulation to pay for all damages occasioned by construction was in the present tense and clearly could not be said to apply to future pipe lines.[34] Though the Tennessee court rejected the plaintiffs' claim for damages that occurred on the pipe line right of way, the court did hold that the plaintiffs were entitled to compensation for damages done to their property beyond the scope of the rights granted to Columbia Gulf.[35] The court said that the easement did provide for future pipe lines, but this did not give the pipe line company the right to occupy, use, or damage the plaintiffs' real property beyond the extent contemplated by the parties when the agreement was signed.[36] The court said:

> We think this is implicit in the right-of-way agreement in the granting clause, which expressly contemplates 'routes' over which the pipe line will be laid and so fixes the area in which the easement can be exercised without liability for damage other than to crops and fences, and for failure to replace the topsoil . . . .[37]

However, if the damages were speculative or conjectural at the time of the granting, the landowner may be compensated for such damages in a subsequent suit.[38] Thus the recovery given by the Tennessee court was only for damages that resulted outside of the right of way and not for the type of damages that the Mississippi Supreme Court approved in *Baker*.[39]

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[31] 56 Tenn. App. 258, 405 S.W.2d 784 (1965).

[32] *Supra* note 3 at ¶ 6. The two agreements contained exactly the same wording.

[33] Scott v. Columbia Gulf Transmission Co., *supra* note 31, at 788.

[34] *Id.* at 788.

[35] *Id.* at 789.

[36] *Id.*

[37] *Id.*

[38] East Tenn. Natural Gas Co. v. Peltz, 38 Tenn. App. 100, 270 S.W.2d 591 (1954); Morgan County v. Neff, 36 Tenn. App. 407, 256 S.W.2d 61 (1953); Carter County v. Street, 36 Tenn. App. 166, 252 S.W.2d 803 (1952); Jones v. Omon, 28 Tenn. App. 1, 184 S.W.2d 568 (1944).

[39] 218 So. 2d 39 (Miss. 1969).

VI. Two Unsolved Problems

Though the Mississippi Supreme Court allowed damages for the "cutting and destroying" of timber and pine seedlings, the court did not allow Baker to recover for the appropriation of the 12.85 acres of land which the second pipe line required.[40] This refusal to provide compensation for the 12.85 acres, coupled with the court's failure to indicate what would be the result if the blanks in paragraph six[41] were filled in with a nominal sum which did not adequately compensate the plaintiff for the damages caused by the second pipe line, deserves further examination.

It is difficult to understand the court's interpretation of the sixth paragraph to exclude damages for the appropriation of land. A hypothetical situation might best explain the problem. A landowner, who is a chicken farmer, has three chicken houses on his five-acre tract of land. The original pipe line had been constructed before he built the chicken houses. The pipe line agreement is similar to the one found in *Baker*.[42] The landowner carefully avoided building his chicken houses over the original line and thus spaced his houses over the five-acre tract. Before the second pipe line can be constructed all three chicken houses will have to be moved. Because the second pipe line need not be parallel to the original line, the five-acre tract will be rendered practically useless, for nothing can be built over the pipe line.

Thus according to the court's holding in *Baker* the landowner is entitled to damages for the chicken houses, but the landowner will *not* be compensated for the land which is appropriated. Thus if the landowner wishes to rebuild his chicken houses he will be required to buy a new tract of land, the cost of which must be borne by him alone. Therefore it would seem that the more equitable solution would be to allow damages as a result of the appropriation of land by the second pipe line, because the $1.00 per rod clearly is not reasonable compensation to the landowner for the loss of land. The landowner is thus at the mercy of the pipe line company and is subject to losing the use of his land without compensation.

The same hypothetical can be used to illustrate the second problem. If the blanks in the sixth paragraph provided for only a nominal sum as damages (thus indicating an agreement between the parties as to the amount to be paid for damages), would the court allow only this amount? Obviously the chicken houses which must be torn down might easily cost several times the amount agreed to by the parties in the agreement for the original pipe line. It seems most inequitable to allow the pipe line company to draw up the agreement and thus limit the damages due the landowner as a result of a second pipe line that is constructed several years after the original pipe line. This same problem could have been presented by the facts in *Baker* if the blanks in the sixth paragraph had been filled in. Obviously, the timber and seedlings could have been worth more than the nominal damages in the agreement.

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[40] *Id.* at 43.

[41] *Supra* note 3, at ¶ 6.

[42] *Supra* note 3.

VII. Conclusion

Though the scope of this note has been limited to the *Baker* case, it is necessary to point out that the type of easement found in this case is quite similar to those found in other jurisdictions and to those that are widely used in Mississippi, all of which could be the subject of future litigation.

In *Baker* the Mississippi Supreme Court did not use the "crops" clause in the agreement but in its stead used a general damage clause. Though the court allowed recovery for damages that resulted from the destruction of timber and seedlings, the court did not allow damages for appropriation of the land nor did the court indicate what it would do if the blanks were filled in with a nominal sum for damages.

It is submitted that the court's action was correct, but that it did not go far enough in providing for damages for the landowner. It would seem that the landowner is indeed entitled to all damages which result from the construction of a second pipe line. This result would not necessarily need to be based on an interpretation of the pipe line agreement, but on equitable principles which would entitle a landowner to compensation for his land which has been taken by the construction of the pipe line.

John Howard Shows

Collateral Estoppel—The Multiple Tort Claimant Anomaly

I. Introduction

A New York state court recently held, in *Hart v. American Airlines, Inc.*,[1] that plaintiffs in a consolidated wrongful death action arising from an airplane crash in Kentucky could successfully plead collateral estoppel[2] against the airline on the issue of negligence where this issue had already been determined in favor of a plaintiff involved in the same crash by a federal court in Texas.

The New York court not only failed to apply the doctrine of mutuality of estoppel, but also allowed the offensive use of collateral

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[1] 304 N.Y.S.2d 810 (Sup. Ct. 1969).

[2] The doctrine of collateral estoppel is distinguished from res judicata in that it precludes relitigation of the same issue or issues, while res judicata precludes relitigation of the same cause of action. When a party is precluded from relitigating the same cause of action, he is barred from relitigating all issues which were, or should have been, decided in a previous suit between the same parties or their privies. Collateral estoppel, on the other hand, can only be raised when a specific issue (such as negligence) has been finally determined, and the same issue is sought to be relitigated by one, or both, of the same parties or their privies (depending on the jurisdiction). *See* Lyle Cashion Co. v. McKendrick, 227 Miss. 894, 906, 87 So. 2d 289, 293 (1956); Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942); Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 Wash. U.L.Q. 158.

estoppel, i.e. where defendant was a party to the prior action but plaintiff was not, and plaintiff seeks to use collateral estoppel.[3]

The *Hart* case is an excellent example of one approach to the problem of the multiple claimant situation as it might arise from an accident involving a common carrier. This paper will study the possible uses of collateral estoppel in suits by plaintiff-passengers against the carrier where there has been a final adjudication of the issue of the carrier's negligence in a foreign court.

II. Mutuality of Estoppel

The concept of mutuality of estoppel—that no party should be bound by a judgment in a prior suit to which he was not a party or privy[4]—has long been accepted as the rule in a majority of jurisdictions.[5] The reasons given for the mutuality rule are essentially (1) due process and (2) fair play.[6] There are certain recognized exceptions to the rule involving derivative liability or the indemnitee-indemnitor relationship;[7] however, few courts have ventured beyond these bounds.

The Mississippi Supreme Court has been among the most rigid in the nation in its application of the doctrine of mutuality of estoppel.[8] Cases in which the Mississippi Supreme Court has applied collateral estoppel include: prior federal court decision in which the plaintiff in the case before the court has been a third party claimant,[9] an attempt by the husband, in an action subsequent to a final decree of separate maintenance giving the husband no homestead rights, to cancel a deed to a house and lot executed by the wife,[10] a suit for specific performance by heirs of the plaintiff in the original action where the contract rights had been previously litigated,[11] and a derivative liability action against the master after a successful suit against a tortfeasor-servant.[12]

The mutuality rule has come under attack from legal writers[13] and

[3] *See* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 290 (1957) [hereinafter cited as Currie, *Mutuality*], for discussion of the offensive and defensive uses of collateral estoppel.

[4] For a discussion of the mutuality of estoppel rule in Mississippi, see Thames, *Mutuality in Collateral Estoppel: Never the Twain Shall Meet*, 37 MISS. L.J. 244 (1966). *See Generally*, 46 AM. JUR. 2d *Judgments* § 521 (1969); 50 C.J.S. *Judgments* §§ 756, 765 (1947).

[5] Thames, *supra* note 4, at 247.

[6] *Id.* at 247.

[7] *Id.* at 245. The exceptions include such relationships as master-servant, principal-agent, bailor-bailee, officer-deputy, and persons represented by another party in litigation. *See* 50 C.J.S. *Judgments* § 757 (1947).

[8] *See* Pace v. Barrett, 205 So. 2d 647 (Miss. 1968); Lee v. Wiley Buntin Adjuster, Inc., 204 So. 2d 479 (Miss. 1967); Johnson v. Bagby, 252 Miss. 125, 171 So. 2d 327 (1965); Thames, *supra* note 4.

[9] C.I.T. Corp. v. Turner, 248 Miss. 517, 157 So. 2d 648 (1963).

[10] Etheridge v. Webb, 210 Miss. 729, 50 So. 2d 603 (1951).

[11] Pray v. Hewitt, 254 Miss. 20, 179 So. 2d 842 (1965).

[12] Granquist v. Crystal Springs Lumber Co., 190 Miss. 572, 1 So. 2d 216 (1941).

[13] *See, e.g.*, Currie, *Mutuality*, *supra* note 3, at 322; Thames, *supra* note 4, at 248;

has been eroded by courts in several areas of the law.[14] Even writers who call for the abolition of the mutuality rule, however, have reservations in cases involving multiple claimants.[15] Professor Currie has pointed out that under the apparent rule of the Bernhard Doctrine[16] the multiple claimant situation could lead to unfortunate results.[17] For example, if fifty persons were injured in a train wreck, and the railway company won the first twenty-five cases, it could not raise collateral estoppel against any of the remaining litigants since they have not yet had their day in court. But if the railway lost the twenty-sixth case, the remaining litigants could invoke collateral estoppel against the railway as to the issue of liability for negligence, thus the railway would win the first twenty-five cases and lose the rest on a single judgment, which, Currie argues, would probably be aberrational due to the jurisdiction or the sympathy of the jury.[18] Currie argues further that the "abberational" judgment in the twenty-sixth case could just as easily have occured in the first case; thus the railway might never get a fair trial.[19]

Other arguments for not applying collateral estoppel offensively in multiple claimant situations are the litigants' lack of awareness of the significance of the action,[20] that the rule would encourage litigation,[21]

Note, *Res Judicata: The Shield Becomes a Sword. Prior Adjudication of Negligence Bars Relitigation of That Issue by Other Plaintiffs in Subsequent Actions Based on Same Accident*, 1964 DUKE L. REV. 402, 404.

[14] *See, e.g.*, Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964) (unfair labor practice); Forrester v. Southern Ry., 268 F. Supp. 194 (N.D. Ga. 1967) (wrongful death); Maryland *ex rel.* Gliedman v. Capitol Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967) (negligence in airplane crash); Michigan v. Morton Salt Co., 259 F. Supp. 35 (D. Minn. 1966) (anti-trust); Hastings v. Rose Courts, Inc., 237 Ark. 426, 373 S.W.2d 583 (1963) (property boundary line dispute); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942); Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934).

[15] Currie, *Mutuality*, *supra* note 3, at 288; Thames, *supra* note 4, at 257.

[16] Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, *supra* note 14 (long the leading case in abolishing the mutuality requirement). The court, in an opinion by Judge Traynor, held that there was no requirement of privity to the original action for the party asserting res judicata (collateral estoppel), merely that the party against whom the res judicata is asserted must have been a party or privy to the action. *Id.* at 894-95.

It should be noted, however, that Bernhard actually ruled on the use of collateral estoppel by a defendant against a plaintiff who had been a party to the original action—a defensive use of the estoppel.

[17] Currie, *Mutuality*, *supra* note 3, at 288.

[18] *Id.* at 281, 288. It is strange that Professor Currie feels so strongly about the "anomaly" which might result from the offensive use of collateral estoppel in multiple claimant situations, since he apparently would see nothing unusual if the same result were reached through individual litigation of the cases—plaintiffs winning twenty-five of the cases and defendant winning twenty-five.

[19] *Id.* at 289.

[20] Johnson v. Bagby, *supra* note 8, at 137, 171 So. 2d at 332; Garraway v. Retail Credit Co., 244 Miss. 376, 386, 141 So. 2d 727, 730 (1962); Currie, *Mutuality*, *supra* note 3, at 288.

[21] Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958); Thames, *supra*

the state's policy of protecting the rights of its citizens to a full day in court,[22] and the full protection of the laws of the state.[23]

III. Affirmative Use of Collateral Estoppel

In *Hart*[24] the court stated that the elements necessary for the application of collateral estoppel in New York are (1) identity of the issue which was necessarily decided in a prior action and that the issue is decisive of the present action, and (2) the party against whom the estoppel is raised (here, the defendant airline) has had a full and fair opportunity to contest the decision now said to be controlling.[25] The court stated further that the burden is on the party against whom collateral estoppel is used to prove he had no opportunity to litigate fully.[26] The court found that the defendant had had his "day in court" and should not be allowed to relitigate the issue of negligence. The court dismissed defendant's contentions, that he was the victim of a jury sympathetically swayed by the plaintiff's plight or prejudiced against large corporations, as being without merit or proof of any sort.[27]

Defendant also raised the argument that the original Texas case had only one plaintiff, and that the jury did not realize the consequences of its actions. The court replied that the defendant's negligence in no way depended on the number of claims which might arise from the event.[28] The issue of full faith and credit[29] was raised by the defendant in an attempt to persuade the court to adopt Texas' rule of collateral estoppel. The court, however, stated that full faith and credit would not be applicable to that issue since it was not a Texas state court judgment sought to be enforced.[30] It then defended the application of its own rule of collateral estoppel on grounds of protecting its citizens.[31] The court in *Hart* was also careful to point out that both it and the Texas court applied the substantive law of Kentucky (where the cause of action arose) which is more favorable to the defendant than New York law would be and further pointed out that a different question might arise if Kentucky law were harsher than New York law to the defendant.[32]

There is some question whether Mississippi courts would use Kentucky or Mississippi substantive law in this instance. The Mississippi

note 4, at 257. *But see* Note, *Res Judicata*, *supra* note 13, where it is suggested that the danger is that defendant will settle all claims out of court instead of taking a chance on a trial. *Id.* at 405.

[22] Johnson v. Bagby, *supra* note 8, at 137, 171 So. 2d at 332.

[23] Pace v. Barrett, *supra* note 8, at 649. *But see* Hart v. American Airlines, Inc., *supra* note 1, at 813.

[24] Hart v. American Airlines, Inc., *supra* note 1.

[25] *Id.* at 812.

[26] *Id.* at 813.

[27] *Id.* at 814.

[28] *Id.* at 815.

[29] U. S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1964). *See* note 40 *infra*.

[30] Hart v. American Airlines, Inc., *supra* note 1, at 813.

[31] *Id.* at 813.

[32] *Id.* at 814.

Supreme Court in *Mitchell v. Craft*[33] held, concerning conflicts of laws, that the forum law should presumptively apply unless it is shown that foreign state contacts are of greater significance.[34]

Where, as in *Hart*, there is no comparative or contributory negligence involved, however, there would appear to be no reason to deny collateral estoppel merely to apply the law of the forum state, which would result in the same verdict.

In affirming the use of collateral estoppel, with regard to the possible anomaly of different juries arriving at different results from the same set of facts, the court in the *Hart* case stated that it would refuse to tolerate a situation in which could arise such ". . . inconsistent results which are always a blemish on a judicial system."[35] This is in direct opposition to Currie's perception of the anomaly as a reason for *not* applying collateral estoppel in multiple claimant situations.[36] While there is merit in the contention that juries will differ in their conclusions upon any given set of facts, the whole judicial system of the nation is designed around the concept that a party will receive a fair trial from a jury. A compromise rule has been suggested which states that unless there has been an *actual* inconsistency of verdicts, collateral estoppel should be applied rather than have the court worry over the mere possibility of an inconsistency.[37] This compromise is quite practical, but it is merely a stopgap solution. It would appear that the jury system is only worth keeping if it renders justice in the great majority of cases. Otherwise, it should be abandoned in favor of a judge, commission, or computer as the trier of fact. An exhaustive evaluation of the jury system, however, is beyond the scope of this writing, and it will be presumed, theoretically, that one jury is as capable as another.

One of the benefits of a collateral estoppel rule such as that adopted by the New York court in *Hart* is the resulting increase in judicial efficiency. In *United States v. United Air Lines, Inc.*,[38] it was pointed out that the trial of the issue of negligence took fifteen weeks, whereas the determination of damages to be awarded took only a few days.[39] Where there are forty or fifty plaintiffs, as there were in *United*, it can easily

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[33] 211 So. 2d 509 (Miss. 1968).

[34] *Id.* at 512. In changing the former rule of using the law of the state in which the event occurred, the court stated: "[T]he most substantial relationships of the parties and the dominant interest of the forum require application of Mississippi law. . . ." *Id.* at 510.

This case resulted from an automobile collision a few miles south of the Mississippi line in Louisiana. Only Mississippi residents (and Mississippi administratrices) were involved. The court stated that its primary considerations in determining which law to apply were the advancement of the forum's governmental interests and the application of the better rule of law (application of comparative negligence instead of Louisiana's contributory negligence rule, apparently seeking a more equitable result).

[35] Hart v. American Airlines, Inc., *supra* note 1, at 814.

[36] Currie, *Mutuality*, *supra* note 3, at 288, 321.

[37] Note, *Res Judicata*, *supra* note 13, at 404.

[38] 216 F. Supp. 709 (D. Nev. 1962), *aff'd sub. nom.*, United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951.

[39] United States v. United Air Lines, Inc., 216 F. Supp., at 716.

be seen that it would create a great and unreasonable burden on the court system to require each plaintiff to bring his suit separately and have a four-month trial. Nor can it be contended that defendant United Air Lines has not had its day in court after a four-month trial on the issue. Clearly some type of consolidation of cases and functional collateral estoppel rule is necessary to avoid such problems arising in multiple claimant situations. Such procedure would also ease the burden of witnesses whose testimony is necessary to the case. They could testify once and be done, rather than having to appear at individual trials throughout the country.

IV. Full Faith and Credit

There is another argument yet undeveloped in cases dealing with collateral estoppel in multiple claimant actions which may be more compelling than any other thus far advanced—full faith and credit.[40] In *Hart*, addressing itself to the airline's contentions that the jury was swayed by sympathy or dislike of corporate defendants, the court stated that such contentions were ". . . a complete indictment of all notions of 'full faith and credit' . . . ."[41]

If a state court in state B is bound by the United States Constitution to give the same effect to a judicial proceeding as would a court in state A in which the judgment was rendered, then does not a court in state B have to recognize the adjudication of the issue of negligence in state A when the same issue arises in state B as to one of the parties to the original action?

Such reasoning is, of course, fraught with many inherent problems of interpretation and policy conflicts. For example, it has been held that full faith and credit should only be applied where there is a final judgment or decree.[42] Is a mere finding of negligence against a party by a jury a "final judgment"? If so, when does it become final? There is no apparent reason for not treating a verdict of negligence against a party as a final determination of that issue where that verdict is treated separately from the issue of damages, just as there is no reason to treat a party convicted of a crime as not yet convicted merely because his sentence has not yet been determined.

This reasoning becomes even more forceful in the multiple claimant situation in which the individual plaintiff is merely a passenger in a public carrier. In this situation, there would be little chance for argument of comparative or contributory negligence to cloud the picture. Nor should there be any question that the use of collateral estoppel for

[40] "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." U.S. CONST. art. IV, § 1. This clause, of course, applies only to state court proceedings. *See* Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEORGETOWN L.J. 857 (1966).

Legislative acts, records, and judicial proceedings ". . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (1964).

[41] Hart v. American Airlines, Inc., *supra* note 1, at 815.

[42] *In re* Vermeulen's Petition, 114 So. 2d 192, 195 (Fla. 1959).

a determination of negligence is predicated on the adjudication (i.e., the judgment) rather than on the law of the foreign state.[43] Reliance on full faith and credit as controlling the choice of applicable law stretches the bounds of the clause too far. As *Hart* correctly held,[44] the state court has a duty to protect its own citizens and should decide on that basis which law to apply.[45]

Several courts have given far-reaching effects to the full faith and credit clause. In *Hughes v. Fetter*[46] the administrator of the estate of a Wisconsin resident who was killed in Illinois brought suit in Wisconsin under the Illinois wrongful death statute. The United States Supreme Court held that the Illinois statute was a public act within the purview of the full faith and credit clause, and thus the Wisconsin court could not refuse jurisdiction because of a Wisconsin statute removing the jurisdiction of an otherwise competent Wisconsin court.[47] (The Wisconsin statute stated that if the forum in which the cause of action arose had a wrongful death statute, the Wisconsin courts had no jurisdiction.) In so holding, the Court stated that the principle of the full faith and credit clause was ". . . maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states . . . ."[48] The apparent theory behind this principle is that Congress, through the Constitution, has determined that the forum state's interest in regulating the affairs of its courts and citizens must yield to the national interest in uniform enforcement of judicial determinations.[49]

The problem of determining when a judgment has become final

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[43] *See* Milliken v. Meyer, 311 U.S. 457 (1940), wherein it was held, concerning final judgments, that neither the conflicting interests of the present forum, nor obvious error by the foreign court justifies refusal of enforcement. *Id.* at 462.

[44] Hart v. American Airlines, Inc., *supra* note 1, at 813.

[45] Generally, any legitimate interest of the forum state suffices to justify application of its law instead of that of a foreign state, since rights asserted under general laws of the foreign state do not have the definiteness of rights reduced to judgment. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, 336 (1963).

See Mandle v. Kelley, 229 Miss. 327, 90 So. 2d 645 (1957), in which a Georgia employee sued a Georgia employer for injuries received while working temporarily in Mississippi. The court held that the Mississippi Workmen's Compensation Act was applicable, notwithstanding the contract between the parties or the full faith and credit clause, except that where the contract expressly provided that the carrier would not pay benefits except under Georgia's workmen's compensation laws, the carrier's liability could not be extended by Mississippi law. Here, unpaid medical bills owed to Mississippi citizens were considered enough substantial interest for Mississippi to apply its own law.

[46] 341 U.S. 609 (1951).

[47] *Id.* at 611, *See also* First Nat'l Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396 (1952), in which the holding was consistent with Hughes concerning an Illinois statute which differed from the Wisconsin statute in that an Illinois court could take jurisdiction if plaintiff could not get service of process on defendant in the state in which the cause of action accrued.

[48] Hughes v. Fetter, *supra* note 46, at 612. *See also* Milliken v. Meyer, supra note 43. *But see* Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903), for a view contra.

[49] *See* B. CURRIE, *supra* note 45, at 333.

is an important problem in the areas of both full faith and credit and collateral estoppel. In *United States v. United Air Lines*[50] the Nevada federal district court stated, in a situation very similar to *Hart*, that a decision in a California federal district court was final for the purposes of res judicata even though the case was being appealed. The reasoning behind the court's ruling was that the federal courts of appeal do not try cases de novo[51] but merely ascertain if there has been reversible error.[52]

This case involved a collision between a United airliner and a United States military jet over Nevada. Twenty-four cases had been brought in the southern district of California and were consolidated in that court for hearing on the issue of liability pursuant to Rule 42 (a) of the Federal Rules of Civil Procedure with the issue of damages tried separately as to each individual under Rule 42 (b). The California court found both United Air Lines and the United States negligent.

The Nevada court consolidated the eight cases brought before it from district courts in Washington and Nevada as to the issue of United Air Lines' liability. These plaintiffs were suing on the same cause of action as the California plaintiffs above. Motion for summary judgment by the plaintiffs on the liability issue was granted, the court holding that the California determination of liability raised collateral estoppel against United Air Lines.[53] The court thus upheld the offensive use of collateral estoppel against the defendant who had been the defendant in the original California action. The Ninth Circuit upheld the Nevada court ruling and adopted this position on collateral estoppel as its own.[54] The use of summary judgment was not questioned since the California decision was affirmed on appeal.[55]

The full faith and credit argument, while not yet developed in the multiple claimant situation, does appear to have some force and logic behind it. Its purpose is to insure that the states will cooperate with one another and recognize each other as an equal. The application of collateral estoppel and res judicata to suits having prior adjudications in other states is certainly in accord with the policies of the full faith and credit clause, and such application could be upheld on this constitutional base especially when considered with the other arguments discussed in this paper.

Federal courts do not generally encounter problems stemming from the conflict of the full faith and credit clause and the policies of state courts. Yet in the *Hart* case a state court reached its decision on much the same grounds as did the federal court in *United States v. United Air*

[50] United States v. United Air Lines, Inc., *supra* note 38.

[51] 28 U.S.C. §§ 2106, 2111 (1964). *See also* Refior v. Lansing Drop Forge Co., 134 F.2d 894, 896 (6th Cir. 1943).

[52] United States v. United Air Lines, Inc., *supra* note 38, at 720-22.

[53] "[N]o constitutional right is violated where *the thing to be litigated was actually litigated in a previous suit, final judgment entered, and the party against whom the doctrine is to be invoked had full opportunity to litigate the matter and did actually litigate it.*" *Id.* at 726.

[54] United Air Lines, Inc. v. Wiener, *supra* note 38, at 404.

[55] *Id.* at 405.

Lines. The elements considered absolutely essential for the application of collateral estoppel by both courts were (1) that the identical issue must have necessarily been finally adjudicated on its merits in the prior case, and (2) that the party against whom collateral estoppel was asserted must have been a party or privy to the original action and must have had a full and fair opportunity to contest the adjudication said to be controlling.[56]

These restraints strike a proper balance between due process and the state policy of protecting its citizens on the one side and judicial efficiency, full faith and credit, and national public policy calling for a final adjudication of disputes on the other. The opinions in both the *Hart* and *United Air Lines* cases argued that mutuality of estoppel places an unnecessary burden of relitigation of issues on the courts.[57]

V. The Comparative Negligence Problem

The issue of comparative negligence presents an interesting problem in the application of collateral estoppel in tort cases such as automobile accidents since an issue must have actually been litigated previously for collateral estoppel to apply.[58] In *Johnson v. Bagby*[59] a prior suit in county court by the father of a driver of a car had held Johnson negligent in a collision between Johnson and the son, Bagby (defendant in the present case). Johnson then sued the son in circuit court, claiming negligence, and the son attempted to raise collateral estoppel against Johnson relying on the previous suit by his father. The court held that there could be no estoppel since the son's comparative negligence had not been litigated in the first case.[60] The court also held there was no indemnitee-indemnitor relationship between father and son since they were not jointly liable, but the court did find an indemnitee-indemnitor relationship between the father and the motoring public through the son's negligence.[61] The court grounded this strained holding on policies of allowing litigant to have his day in court (apparently as many days as he wants) and because of the difficulty of the litigant's foreseeing the possible future significance of matters presently before the court.[62] Considering this decision, the court's apprehension over the lack of foreseeability of the rulings of courts is certainly justified, but such arguments are an extremely thin veil over blatant forum shopping, perhaps surpassed only by the Mississippi Supreme Court's decision in *New Orleans and Northeast Railroad v. Gable*.[63]

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[56] United States v. United Air Lines, Inc., *supra* note 38, at 727; Hart v. American Airlines, Inc., *supra* note 1, at 812.

[57] United States v. United Air Lines, Inc., *supra* note 38, at 726; Hart v. American Airlines, Inc., *supra* note 1, at 813.

[58] Bush Constr. Co. v. Walters, 254 Miss. 266, 274, 179 So. 2d 188, 191 (1965); Johnson v. Bagby, *supra* note 8, at 135, 171 So. 2d at 330.

[59] Johnson v. Bagby, *supra* note 8.

[60] *Id.* at 135, 171 So. 2d at 332.

[61] *Id.* at 134, 171 So. 2d at 330.

[62] *Id.* at 137, 171 So. 2d at 332.

[63] 252 Miss. 605, 172 So. 2d 421 (1965).

In *Gable,* two separate suits arose when Gable's truck, driven by his son, collided with a train. Gable filed suit against the railroad in circuit court. One month later the railroad filed against Gable and his son in federal district court in the southern district of Mississippi. The federal suit, which reached conclusion first, resulted in a $7,500 verdict for the railroad. Gable did not counterclaim on the issue of comparative negligence. The railroad then was allowed to plead the federal court verdict as a counterclaim in circuit court. The circuit court found for Gable who was awarded $10,000 in damages after the counterclaim. The Mississippi Supreme Court held that Gable was not barred from his action in circuit court by Rule 13 (a) of the Federal Rules of Civil Procedure (mandatory counterclaims), since he already had a suit pending in state court when the federal suit was filed. Thus there was no res judicata since the railway's comparative negligence was not litigated in the federal suit.[64] The court said nothing about the effect of the two separate judgments. Apparently they would still stand even though the railroad's judgment had already been allowed as a counterclaim.

Clearly this type of situation should not be allowed to develop. If the railroad wanted the case in federal court, it should have removed the state court action rather than beginning its own. On the other hand, could an individual, following this precedent, begin an action in state court *after* the filing of the federal suit, bring the action to completion first, not counterclaim in federal court, and thus defeat the jurisdiction of the federal court? Or could a party file suit in another state court to avoid litigation of comparative negligence in the original forum?

There is no sound reason why litigation should be conducted like a chess game played on two different boards. No public or judicial policy is served by developments such as occurred in the *Gable* case. The underlying policies of res judicata and collateral estoppel—judicial efficiency, uniformity, and the reaching of a final conclusion to the litigation of an issue through a single lawsuit—are subverted by policies which allow blatant forum shopping as was evidenced by the *Johnson* and *Gable* cases. There is nothing inherently wrong with the comparative negligence rule, but it should be enforced in a single litigation.[65]

While it is true that the comparative negligence rule presents definite problems in the application of collateral estoppel to suits stemming from automobile collisions and the like, it is difficult to see how comparative negligence could affect passengers on a train or airplane who might be involved in multiple claimant actions.

VI. Conclusion

Thus there appears to be no valid reason why a rule of collateral estoppel in multiple claimant situations such as that exposed in

[64] *Id.* at 611, 172 So. 2d at 423.

[65] This could be done through compulsory counterclaims or consolidation of actions as provided for in the Federal Rules. FED. R. CIV. P. 13 (a), 42 (a).

Hart and *United Air Lines* should not be adopted by the Mississippi courts. There would be no substantial betrayal of state interest, merely an inroad into a jealously guarded legal tradition (mutuality of estoppel) which has long outlived whatever usefulness it might have once had. The proposed rule, which requires (1) that the identical issue has necessarily been finally adjudicated on its merits, and (2) that the party *against* whom the estoppel is asserted was a party or privy to the original action and has had a full and fair opportunity to litigate the issue, denies neither plaintiff nor defendant his day in court, since each individual plaintiff has a separate trial to determine damages. It merely signals an end to relitigation of issues which have been finally concluded against a party. The courts, under the proposed rule, would look to what has actually been litigated rather than to technical niceties such as mutuality of parties. The result is judicial harmony and efficiency with no real sacrifice of due process.

Although Mississippi courts do not yet suffer from the hopelessly overcrowded dockets found in the more populous states, judicial efficiency without compromise of due process is becoming increasingly important throughout the nation's court systems, and Mississippi cannot keep from becoming affected eventually by increases in population and litigation. While it is not yet necessary or desirable to effect judicial efficiency or reform merely for its own sake, there is a coming need for changes in the law to meet the needs of the present. The alterations of the collateral estoppel rule proposed in this paper are needed changes and should be adopted for policy reasons, even if they are not compelled by the full faith and credit clause of the Constitution. Once a party has had his day in court with a full and fair opportunity to litigate an issue, there is no reason to permit him to relitigate the issue before a different forum whether he be plaintiff or defendant. The purpose of litigation is to resolve fairly the controversy at hand and to insure enforcement of the resolution once it is finally adjudicated. The proposed collateral estoppel rule certainly appears to further these ends, and there is no substantial reason it should not be adopted in the multiple claimant situation described herein.

Kenneth A. Rutherford

MISSISSIPPI SUPREME COURT RULE 41

In order to facilitate the careful and efficient disposition of the docket of the Supreme Court, which is increasing substantially in volume each year, IT IS ORDERED that the following is hereby adopted as Rule 41 of the Supreme Court of Mississippi:

RULE 41. ABSTRACT OR ABRIDGMENT OF RECORD REQUIRED WHERE RECORD EXCEEDS 500 PAGES.

(a) In all cases where the record contains over 500 pages, the appellant shall (and in all other cases the appellant may at his option) make and file with his brief an abstract or abridgment of the record which shall consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary for a clear understanding of all questions presented to this Court for decision. The abstract shall contain references to the pages of the record. When testimony is abstracted, the first person shall be used. Whenever a map, plat, photograph, or other exhibit must be examined for an understanding of the testimony, the appellant should reproduce such exhibit by photography or other process when practical to do so and insert it at the appropriate place in the abstract.

(b) If appellee considers appellant's abstract to be defective or insufficient he may, at his option, submit with his brief a supplemental abstract which shall be prepared generally as set out in Paragraph (a) insofar as is practical, and shall point out wherein appellant's abstract is defective or insufficient, with appropriate references to pages in the record. Appellee's supplemental abstract shall not repeat those parts of appellant's abstract not claimed to be defective or insufficient.

(c) The abstract, and any supplemental abstract, shall be included in the brief of the party filing it, and this section shall not contain any argument or editorializing. Any argument on the facts shall be contained in other parts of the brief. The pages containing appellant's abstract of the record and appellee's supplemental abstract shall not be counted for purposes of the fifty-page limitation on the length of briefs.

(d) This rule shall apply to all cases in which the record is filed after September 1, 1970.

COMMENT ON RULE 41

*Robert G. Gillespie**

By enacting Chapter 305, Laws of 1962, amending MISS. CODE ANN. § 1640 (1956), the legislature recognized the need of relieving the bar and the supreme court from coping with a large mass of irrelevant material in appeal records. The amendment required the parties to designate the portions of the record needed on appeal and thus gave the lawyers the opportunity to abridge the record so as to include only such parts of the clerk's record and court stenographer's notes as the issues required. It is apparent that the amendment has failed to accomplish its purpose. The number of cases in which there has been a significant abridgment of the record is negligible.

The number of cases and the length of the records increase each year. During the past court year 498 cases were filed in the supreme court. The court disposed of 399 cases on the merits. About 100 cases were settled or dismissed for various reasons.

Many records contain page after page, volume after volume, of deraignment of title as to which there is no issue on appeal; testimony on the question of damages when the only issue is liability; voir dire examination of jurors as to which there is no issue on appeal; testimony on preliminary motions not involved on appeal, etc. The wasted time lawyers and judges spend in dealing with this useless material and the extra court costs incurred should be eliminated. The new Rule 41 requiring an abstract or abridgement of the record in cases involving over 500 pages is an effort to partially solve the problem. In cases having less than 500 pages the lawyer may file such abstract. The success of the new rule will depend upon the lawyers. The hoped for results will materialize only if the lawyers read and study the records and prepare their abstracts in the full realization that the supreme court must accept as true every fact favorable to the appellee which the evidence and permissible inferences fairly establish. It will not help to give only one version of the facts if this version is contradicted, to slant the facts in the briefer's favor, or to argue facts in the abstract.

Where there is any question as to the facts, the abstract may contain a synopsis of the testimony of each witness whose testimony is pertinent. The synopsis will be especially helpful in those cases involving such questions as whether the verdict is contrary to the overwhelming weight of the evidence, whether the chancellor was manifestly wrong, whether the evidence made a jury issue, whether the order of an administrative agency was supported by substantial evidence, and similar questions.

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* Presiding Justice, Mississippi Supreme Court.

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